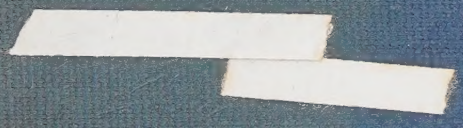

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FOREWORD

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DENNIS & CO., INC.

Buffalo, N. Y.
September, 1951

The North Carolina Law Review

Volume III
1924-1925

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Published Quarterly by the University of North Carolina for
THE SCHOOL OF LAW
The University of North Carolina Press
Chapel Hill
1925

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The
North Carolina
Law Review

Volume Three | February, 1925 | Number One

CHIEF JUSTICE SHEPHERD AND HIS TIMES*

ROBERT WATSON WINSTON

In a conversation relating to great American Judges I once heard Dean Pound make this statement: "Of the three, or possibly four, great American state Judges," he said, "North Carolina has contributed one—Ruffin the elder."

Why it is that relatively speaking North Carolina judges have stood higher abroad than North Carolina lawyers would be an interesting study. It may be suggested that this is a rural commonwealth, having neither cities nor a metropolitan press, and that a lawyer is dependent on both of these advantages to broadcast his fame.

Passing by the obvious reply that neither the lack of cities, nor a merely local press, dimmed the fame of such judges as Ruffin, Gaston and Pearson, we might call attention to lawyers of national preëminence who resided in states quite as sparsely populated as North Carolina. But after all must it not be said that the reason this state has had judges of far famed recognition, but no such lawyers is this: Her judges either before or after going on the bench, made due preparation for their life work, her lawyers did not; the former have been willing to undergo a severe mental discipline; the latter have not.

Unless the lawyer burn the midnight oil, striving after a larger vision of life—can he be called a great lawyer? If the sole aim of a lawyer be to raise a laugh with a rustic crowd or to read his triumph in the verdict of the twelve, will not his fame like the borealis race flit ere you can point its place? The stump speaker struts his little day and is forgotten, whereas a Webster, steeped in

* This address was delivered on December 2, 1924, on the occasion of the presentation of the portrait of the late James E. Shepherd to the School of Law of the University of North Carolina.

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the tragedy of Macbeth, immortalizes the Knapp murder trial and is on every schoolboy's tongue; and a Clarence Darrow, filled with the psychology of Freud and John Watson, sets a continent by the ears and adds a new chapter to criminology. In a rough and tumble fight before the jury I would have staked my last dollar on Cy Watson, Rom Linney or Tom Argo against S. S. Prentiss, Ben Butler or Tom Corwin; but should that forum—the forum of wit, sarcasm and brilliancy—be the goal of a first rate lawyer? Whenever dash and repartee go up against scientific knowledge, is the issue ever in doubt?

Just here it may be well to ask what has been the prevailing thought on the subject of thorough preparation for the Bar among cultivated Carolinians, even among the Trustees of this University. Has it not been to laugh at and ridicule such preparation, to acclaim "hard horse sense," to point to Abe Lincoln and other self-made men who had no "schoolin' " at all? Indeed, is it not too true that public men prophesy smooth things only to the people—oftentimes maintaining themselves in office by appealing to ignorance and prejudice?

In Gerrard Hall, when Dr. Wilmer recently declared that the greatness of this University consists in the fact that her sons seek culture, not for culture's sake but for service, did he imply that culture is hurtful to service? If so, Rousseau was right—the arts and sciences have retarded, not advanced civilization—and civilization is a flat failure. If the best in art and science, in literature and religion is not to be sought after, what is to be the goal?

The sore spot in the history of North Carolina, was it not indifference to the higher things in literature and life? For example, was not the spectacle of a backwoodsman like Phil Alston, with vulgarity and ridicule, chasing the constructive statesman William R. Davie off the stump and out of the state but too characteristic of a rude, an over-heroic past? Fortunately the tide has now set in the opposite direction—away from buffoonery and mediocrity, away from retarding and vulgarizing self-satisfaction, away from cheap claims to priority and superiority in apocryphal or trifling historical incidents. Surely when the Trustees last summer established an accredited three year law school it rejoiced everyone who feels that North Carolina boys and girls are entitled to the best without going elsewhere to get it.

And while I am on this branch of my subject, let me get all that I have to say by way of criticism well out of my system. Per-

haps the lesson which James E. Shepherd's life teaches will then stand forth in brighter colors. This being a day of straw ballots and of rampant pragmatism, I have just now resolved myself into a Literary Digest Bureau and made a tabulation of prominent Carolinians. My purpose among other things, was to find out where the greatest Carolinians got their training, whether at home or abroad, and to ascertain which training, native or foreign, had produced the best results.

To avoid mistakes the subject was approached from several angles; and though the experiment may be of little probative value, it is interesting to say the least. Thus the net result shows that: *A large, a very large proportion of outstanding North Carolinians was educated abroad and not at home.*

Is it an accident for example that the foremost North Carolina judge was educated at Princeton; that the greatest forensic orator and debater graduated at the same institution; that Davie, the founder of the University, and four of her eight presidents were educated out of the state? If this be an accident, then let us enlarge the electorate; increase the straw balloting.

There have been twelve Chief Justices of our Court; four or 33 1/3% received the culture of Yale and Princeton. Of twenty-four U. S. Senators, seven or nearly a third were educated out of the state. So, of the Governors, twelve out of forty-eight had foreign culture. Perhaps this test, mere office-holding, is not a fair one; though it must be remembered that the Trustees of the University and members of the General Assembly are picked men, and that the former have always chosen the University President and the latter, till 1868, chose the Chief Justice. However, let us apply a severer test, that of cultural excellence.

Lewis in his *Great American Lawyer* series, an eight volume collection, selects only three North Carolina lawyers—Ruffin, Gaston and Pearson—all judges, by the way. Of this number, two had the advantage of foreign culture. By way of curiosity, I next turned to an edition of *The South in the Building of the Nation*—twelve handsome leather bound volumes—recounting the achievements and reproducing the work of each Southern state: in art, science, fiction, oratory, politics, and social life. Not a scrap on any of these subjects did I find emanating from or credited to the state of North Carolina. So again in Peele's *Distinguished North Carolinians*—a work purporting to contain great utterances of great Carolinians—sixteen persons are selected, nine of whom, or more than half, were

educated elsewhere. The greatest constructive intellect perhaps in the state's life, Walter H. Page, was trained at Johns Hopkins; a circumstance to which his biographer, rightly or wrongly, ascribes Page's career of usefulness.

Now as I have said, whether this data prove anything or nothing, I can not undertake to say, but it would seem to behoove the man on the watch tower to inquire wherefore this inferiority complex; what was the reason for this disproportion of successful North Carolinians educated out of the state, to those educated within the state. Was it due to thin and scant courses of study; to a prevailing idea, for example, that anyone who chooses can be a lawyer; that intensive training is a detriment to real success at the Bar; that culture is an affectation, a waste of time and money? In my opinion, such was the case. I am unable to conclude otherwise. In the past our young men were rushed into life unprepared. In native talent, in the essentials of true success, man for man, North Carolinians are equal to the best; and, with proper training, will be surpassed by none.

Some time ago a kinsman of mine was complaining of a young friend of ours: "Why," said he, "that young fellow is quite beside himself, he has mortgaged his home to attend the Harvard law school." Two years after this conversation, casually picking up a North Carolina paper I saw that the deluded young man had already made a fair start in life, had been elected to the State Senate.

There was a day when hard times and the duty of remaining in the old home cut short many a youthful career, a day which we fellows, coming on just after the Civil War, do not easily forget. Naturally, *we* early developed a sectional complex, and a sectional complex is deadly to culture. But now that prosperity has supplanted poverty, there is no reason why this state shall not excel in things of an ethical as in things of material value.

Indeed as a faithful straw ballot statistician, it is my duty to report further: *That since about 1900 when North Carolina found herself, the disproportion of successful Carolinians educated abroad to those educated at home has greatly decreased.* Whereas a few years ago North Carolina was the tail end of illiteracy, the Rip Van Winkle of states, today she has as bright a future as any one of the sisterhood. Is it not inconceivable that a state whose former call on fame was the silly remark—"What was it the Governor of North Carolina said to the Governor of South Carolina?"—is the same

state whose University today is President of the Association of American Universities and whose pride and progress are the wonder of a metropolitan press?

It must not be thought that I undervalue the self-made man, I do not, I honor him. But I do decry the former tendency of belittling the necessity of severe mental discipline. I frankly admit that in rare instances broad culture may be self-acquired. Indeed such was the case with the man whose portrait I now have the pleasure and honor of presenting to this law school. And yet I maintain that the life of James E. Shepherd fully illustrates the truth of what I have undertaken to show, that, with or without a college education, severe mental training and high ideals are the cornerstone of genuine success.

Though the mental training which Chief Justice Shepherd underwent was neither in law schools nor college halls, but in the more arduous school of adversity, penury and civil war, it was nonetheless genuine, illustrating, as we shall see, Juvenal's wise saying, "Haud facile emergunt, quorum virtutibus obstat, res angusta domi." Early left an orphan, an only brother killed at Gettysburg, his father's estate dissipated by war, the care of a dependent sister devolving upon him, nevertheless the undaunted lad faced life with a high, a definite purpose. Whether as fifteen year old marker-boy in Lee's army, as telegraph operator, earning a livelihood while he pursued the study of the law, or as attorney, professor of law in this University, and judge of the highest Court, he brought to his daily task a thoroughness, a conscientiousness which is the essence of culture.

When I first came to the Bar, lawyers had the habit of riding the Circuit with the Judge. In the early 80's, it was my privilege to go the old Fifth District with Judge Shepherd; the Judge and I riding behind a span of fine horses over the hills and to the courts of Person, Granville, Vance and Franklin. *Dies borealis*, they were. The flavor of the Old South still lingered—its ease, its dignity. The days of telephone, jazz and bobbed hair had not yet arrived. Fitting into that good day like apples of gold in pictures of silver was the sweet spirited man whom we now honor: in dignity of manner, in strength of character, in accuracy of knowledge worthy to sit in any court.

I fully agree with Governor Aycock, in his address on Judge Shepherd, that as a trial judge, Shepherd has had no superior. Like Mansfield, Judge Shepherd felt that it is the duty of a judge to make

it disagreeable for a lawyer to talk nonsense. In his court business was speedily dispatched, but without haste or brusqueness. To the argument of really important points of law or evidence there was no limit; but if the matter was unimportant or well established, the Judge allowed no time to be wasted. If the examination of a witness were conducted to make a grandstand play or to kill time, the Judge's prompt and decisive: "Proceed—proceed" had the desired effect; the lawyers soon understanding that a real judge was on the bench. Of Judge Shepherd as a Superior Court judge, this must be said, he never hastened home, leaving a congested docket behind for some more conscientious judge to clear. As a Supreme Court judge also, I concur in Aycock's estimate of him, that opinions more carefully considered or better prepared have not been handed down by our Court.

Judge Shepherd was not an ex-tempore or ready man, on the contrary he was a full, a patient, a profound man. If a question was suddenly sprung upon him, he would perhaps venture no opinion until he could investigate and go to the bottom of the matter. It has been said, "Beware of the man of one book." Indeed one great book, thoroughly digested, who can estimate its value! Such book to Judge Shepherd was White and Tudor's *Leading Cases in Equity* —to which must be added Smith's *Leading Cases*.[1] In these storehouses of knowledge, being great opinions of great English and American courts, Judge Shepherd found the taproot of modern jurisprudence; to them he constantly referred as the starting point of an investigation.

The success of such a man was no accident, it was based on merit, on work faithfully performed. Labor itself being a pleasure, to him the study of law was more inviting than society, clubs, games or other forms of amusement. Indeed it must be said of Judge Shepherd that, like most accurate thinkers, he was a lonesome man.

In the preparation of an opinion he would study the record with care, digest the facts, re-writing the salient points in his own words; he would next scan the briefs, read and array the authorities, making notes as he went along. Then, laying aside records, briefs, notes and authorities, he would think the matter through—for days, weeks, finally incorporating it into a well fixed system. At this point the task of most judges would have ended, but not so with Judge

[1] White and Tudor's *Leading Cases in Equity* and Smith's *Leading Cases* (fully annotated and edited) were the precursors of the modern "case system" and were a *vade mecum* in their day.

Shepherd, he was now but beginning his labors. Seeking out a brother lawyer or judge, these two, on their tramps through the silent forest, would in Bacon's phrase toss the thought to and fro in the air, even as the husbandman tosseth the hay to dry and sweeten it. And how delightful were such occasions. What a wealth of learning the Chief Justice had, without pedantry, dogmatism or self-assertiveness. And so modest and simple withal, so truly great.

One such occasion had an amusing ending. The case of *Barbee* v. *Barbee*[2] was before the Supreme Court. The point was this, can the recital in a deed of the payment of a certain consideration be contradicted by parol—that is to say, is such recital contractual or merely evidential. It so happened that during a term of Wake Superior Court over which I presided, Judge Shepherd was writing the opinion in the case and the Judge and I had many a conference over *Barbee* v. *Barbee*. Now it also chanced that at that time the Chief Justice of a certain Canadian Province, a venerable white-haired man, was likewise in Raleigh on a visit. So one evening Judge Shepherd knocked at my door and suggested that we call and pay our respects to our distinguished Canadian brother. I knew in a flash what was up, Judge Shepherd was going to try out *Barbee* v. *Barbee* on that innocent Canadian. And sure enough he did. We had hardly seated ourselves when the Judge began: "We are much perplexed, your Lordship, about a new doctrine of equity," said Judge Shepherd, proceeding to elaborate the point. As we held our breath awaiting the reply, this was the dear old gentleman's contribution, couched in velvet words: "If there be doubt about the question, why not submit it to the Supreme Court of the United States?"

I have referred to Judge Shepherd's work as a system of equity, a doctrine of law. And such it was. A system, not a detached fragment; a doctrine, not a mere dictum. In this way and in no other could his analytical mind operate. To him law was more than a set of rules. Law was unity—it implied totality. In nature this unity, this totality, exists and is called the law of nature. Why does not the same principle hold good in human affairs? Municipal law is not therefore to be thought of as something superimposed, something from without, but as something within. The unity of all

[2] *Barbee* v. *Barbee* (1891) 108 N. C. 581, 13 S. E. 215 (affirmed 109 N. C 299, 13 S. E. 792).

differences in things of the same class, this is what is meant by law. In a word, law is not a mechanism but an organism; it grows, and develops, but is always true to type, true to species.

Because Judge Shepherd's mind worked in this way, from within a subject out, and not from without in, he could not abide individual cases—mere photographic views of life. For example, he was never interested in the law of torts with its uncertainties and variations, or in rules of practice and procedure, or indeed in any subject incapable of categorization. Little "pints" of law, discretionary rulings on the sufficiency of code pleadings, equally with trumpet-blowing, experimental decisions to catch the populace, these were for others, not for him. Code pleading, which someone likened to one old woman scolding another old woman, made its appearance the year Judge Shepherd came to the Bar. Displacing the certitude of common law pleading and practice, it was especially distasteful to the old lawyer.

I could never tell exactly how Judge Shepherd relished the change from common law to code pleading, but from the zest with which he used to tell a story on Chief Justice Smith and my father, I concluded that he was in sympathy with them. In a case in Martin County about 1870, a defective complaint had been filed and the two above named lawyers wished to file a demurrer, not "going to the case," but to a matter of form. Now they thoroughly understood the old common law demurrer with well-defined meaning and consequences, but the new code demurrer, resting so largely in the judge's discretion and with direful results if he was against you, why that was quite another matter. "So," said Judge Shepherd, "Smith and Winston, in a great quandary, put their heads together, finally coming into court and cautiously announcing: 'Your Honor please, we desire to file this paper: a plea in the nature of a demurrer.'"

When Shepherd was transferred by election from the Superior to the Supreme Bench, the spirit of conservatism which had characterized North Carolina courts from the beginning was dominant. In 1889 the old order was in full swing. W. N. H. Smith was Chief Justice, Gen. Scales was Governor, Vance and Ransom Senators, and nearly all congressional seats were filled by Confederate soldiers. In this goodly company Shepherd was at home. More diligent, more painstaking, and with a larger concept of the law than his fellows—except the learned Chief Justice Smith—Shepherd was a high priest in the conservative temple. Indeed of him it must

be said, he belonged to what Prof. Stephenson calls the historical, analytical school of judges, who agree with Bacon that the province of the judge is *dicere* not *dare*.

Such men find it difficult to concede a spark of honesty to judges of the opposite school, who contend that courts have no power to set aside an act of the Legislature. The pet contention of the "tough-minded" judge, that courts should have no will of their own, but should ascertain and follow the will of the people, what is called the *mores;* such a doctrine, to the "tender-minded" judge, is downright treason to first principles.

Taking Ruffin as his model, Shepherd's task was to continue the comprehensive system of equity and the well-establish law of real property, contracts and negotiable instruments, for which North Carolina had been so justly famous. To Ruffin, hard cases had not been quicksands of the law; in the golden era of our judicial life, individual cases had yielded to the greater whole; so in his day Shepherd determined to hold the rudder true, regardless of consequences. No sooner had he taken a seat on our highest bench than he sounded the keynote of his judicial career, adherence to fixed principles, stability and certitude in the utterances of courts. Said he, in the *Moffitt case*:[3] "We have gone far enough in admitting word of mouth evidence to contradict a written contract; wise rules which are intended for the protection of the provident should not be refined away for the relief of the negligent."

Judge Shepherd seldom dissented from his brethren, but when he did dissent, as in *Farthing* v. *Dark*[4] and in the *LeRoque case*,[5] the profession felt that the dissenting opinion would some day become law. It will be remembered that a nice principle of equity was involved in the latter case: If an insolvent husband uses his own funds to erect a dwelling on his wife's land, can the creditors follow the money in the said land, that is, can the creditors attach a trust to the estate of the wife and hold her to account, as a trustee *ex-maleficio*. Differing with the majority of the court, Judge Shepherd saw no reason to the contrary, and the court finally adopted his dissent.

In cases like *Starnes* v. *Hill*[6]—which stands out like a beacon light—his analytical mind displayed its best qualities. Here he dis-

[3] *Moffitt* v. *Maness* (1889) 102 N. C. 457, 9 S. E. 399.

[4] *Farthing* v. *Dark* (1891) 109 N. C. 292, 13 S. E. 918 (reversed 111 N. C. 243, 16 S. E. 337).

[5] *Thurber* v. *LaRoque* (1890) 105 N. C. 301, 11 S. E. 460.

[6] *Starns* v. *Hill* (1893) 112 N. C. 1, 16 S. E. 1011.

tinguished between a vested and a contingent remainder, applying the abstruse but well defined *Rule in Shelly's case*. Running through all his opinions indeed, from first to last word, one recognizes that which the musician calls the motif. This, I understand to be golf vernacular for "Keep your eye on the ball"; it is also the lesson taught by my old schoolmaster James H. Horner; "If you are in pursuit of a fox," he would tell the boys, "never stop to chase a rabbit."

How well Judge Shepherd succeeded in maintaining a system of jurisprudence suitable to the needs of the times, depends upon the point of view. The conservative recognizes in Judge Shepherd's concept of law the only security of liberty and property—the enduring foundation of the Republic; the radical, on the other hand, calls him a reactionary and hails the coming of a better day when the people will not only make but interpret the laws. But neither conservative nor radical will deny that the principes which Judge Shepherd stood for, were those of Henderson, Ruffin and Smith, under which order was maintained and justice administered.

In 1894, when Chief Justice Shepherd was defeated by a combination of Populists and Republicans, the old order was passing away to give place to the new. The day of the idealistic judge who concurred with Hooker that law is the perfection of reason, her seat the bosom of God, was soon to end; the time for testing and trying out all things was come. As science had been changed from mere ratiocination to experimentation, so law, cut loose from precedent, should adjust itself to human needs from day to day. Whatever is, is wrong, became the slogan of the radical members of the Supreme Court, now divided 2-2 on disputed social and political issues, putting it up to a fifth judge to break the tie. Consciously or unconsciously, the doctrine of William James: "Try it out and see if it will work"—the "Monte Carlo doctrine"—was supplanting idealistic philosophy. Because of the conflict involved in this change, in 1902 when the position of Chief Justice was again to be filled by popular election, Shepherd, though urged by friends to do so, refused to enter the race.

Of this "bread and butter" philosophy, of this thing that James calls pragmatism, it must be said that it came with a crash upon "tender-minded" judges like Shepherd, who had been taught to regard the judicial office as a sacred affair. A political judge! What could be worse! The first of the new order, the first of those "tough

minded" individuals who had occupied the Supreme Bench was Shepherd's predecessor, Chief Justice Merrimon. Merrimon's dissent in the *Barksdale case*[7] may be said to mark the dividing line between the old and the new in our juristic thought. Previous to that dissent, education had been considered a luxury, a privilege of the rich; thereafter, it was to be considered a necessity; the common heritage of poor and rich alike.

"Public education is a public necessity, more necessary indeed than jails, roads, electric lights or waterworks; no election is necessary to validate a bond issue for schools or schoolhouses; the children of North Carolina must be educated, no matter what the Constitution implies to the contrary." Such in substance was Merrimon's dissent. This utterance placed the welfare of the child above the letter of the law; it breathed the breath of life into the Constitution. Indeed so impressed was I, then a rash young Superior Court Judge, that I rushed into the fray,—in the *Bladen County case*—threw my judicial cap in air, and overruled the entire Supreme Court; getting myself highly praised—and thoroughly spanked—by the Court on appeal![8] Twenty years later, as is well known, in the *Collie case,*[9] *Barksdale*[10] itself was overruled.

If Shepherd could not follow Merrimon in blazing new trails, he was quite unable to comprehend the views of that sociological, politico-pragmatist, Chief Justice Walter Clark—who counted that day lost when he did not prepare some bill enacting a dissent of his into law or write an opinion overruling some hoary precedent. What glory to Clark greater than overruling Ruffin in the *Rockingham will case;* how gleefully he whetted his blade for the sacrifice, as, concurring in Connor's great opinion overruling *Hoke* v. *Henderson,*[11] he exclaimed: "There is no peculiar sacredness attaching to *Hoke* vs. *Henderson!*" North Carolina has had but one image smasher.

The contrast indeed between Shepherd and Clark is nowhere more clearly seen than in dealing with precedent. To Shepherd precedent was grateful—to him the Constitution was as sacred as to Marshall or Hamilton; on the other hand, Clark was never hap-

[7] *Barksdale* v. *Comrs.* (1885) 93 N. C. 472.

[8] *Board of Education* v. *Comrs. of Bladen County* (1892) 111 N. C. 578, 16 S. E. 621.

[9] *Collie* v. *Comrs.* (1907) 145 N. C. 170.

[10] *Barksdale* v. *Comrs.* (1885) 93 N. C. 472.

[11] *Hoke* v. *Henderson* (1833) 15 N. C. 1; overruled by *Mial* v. *Ellington* (1903) 134 N. C. 131, 46 S. E. 961.

pier than in destroying precedent: to him the Constitution was anything but a palladium of liberty; it was a device of the rich to enable them to pocket and protect their ill-gotten gains, and the sooner blotted out and a brand new one substituted, the better.

The struggle between the forces of progress and conservatism was slow to develop in North Carolina, but when it came it came in earnest, reversing the do-nothing policy of a century. Every department of state government was shaken to the center; the Supreme Court itself, whenever Chief Justice Clark could dominate, becoming incubator for remedial legislation, adviser of progressive political parties, defender and maintainer of radical propaganda. What cared Clark, the Chief Justice, though his Court were more often overruled than affirmed, by the Supreme Court at Washington;[12] to be overruled in a "progressive" cause was itself an honor.

If Shepherd lost out in this struggle, he went down without sacrifice of principle. A conservative to the last, it was due to him and to other conservative judges that North Carolina escaped the unbaked jurisprudence of certain northwestern states. Let us put ourselves in Shepherd's place and ask: Are the principles of law fixed and certain? Shall we visualize an Ideal and strive to attain it, or shall we each day try out something new? Are there Ultimates? Those who lived before the philosophy of William James, answer there are; those who have come on the stage since, say there are not. As in religion and politics, so in law, the New advances, the Old recedes: the conservatve and the radical each alike being necessary to maintain the balance.

In his day, the conservative served his generation faithfully; his quantitative tests did not fail. Even so in the new day, good and wise sociological and ethical judges assure us that the method they propose is the method of the great Chancellors, who, "without sacrificing uniformity and certainty, built up the system of equity with constant appeal to the teachings of righteousness and

[12] "Prior to the sixty-third Reports, no writ of error had gone from this Court (North Carolina Supreme Court) to the Supreme Court at Washington. Since then fifty-nine writs of error have been disposed of by said Court, with the following results:

Dismissed	17
Affirmed	20
Reversed	22
	59

Affirmances 47 percent of appeals." See *Centennial Celebration Supreme Court of North Carolina* (1919) 176 N. C. 788.

conscience"; that this is the method by which the common law has renewed itself, at the hands of great masters: the methods of Marshall as well as Holmes, of Shepherd as well as Clark.

I have not undertaken to set down all the events of Judge Shepherd's useful life: Such as his services in the Constitutional Convention of 1875; or on the bench of Beaufort County; nor have I spoken of his honored ancestry, of his kindness to young lawyers, of the love he inspired in a few choice spirits, of the influence of his life upon the state; nor his exhalted position at the Raleigh Bar after retiring from the bench, when, without repining at defeat, he gathered together a select clientele, became one of our foremost lawyers, and, eschewing the tricks of shyster and demagogue, held aloft the banner of a noble profession. This pleasant duty has been performed by hands more cunning than mine: in the 158th volume of North Carolina Reports, my then law partner, Charles B. Aycock pays a just tribute to Judge Shepherd as husband and father, as man and Christian.

In 1899, when the inspiring teacher and gentleman, John Manning, died, the Trustees and Faculty of the University were desirous that Judge Shepherd should succeed him as head of the Law School. Indeed Dr. Manning and Judge Shepherd together, a few years before, had conducted the school with marked success. The position of Dean—though it was not then called Dean—was accordingly tendered the Chief Justice, and during several months he took the matter under consideration, hoping to accept. Finally with that consideration for others so characteristic, the Chief Justice declined; his first duty was to continue the practice until his son, Sylvester Brown Shepherd, just come to the Bar, could establish himself. Carrying out this arrangement Judge Shepherd and his son practiced law in the city of Raleigh until the death of the Judge in 1910.

At the age of 64, in the delights of a home, made happy by the love of wife and son, with numerous grandchildren to bless and be blessed by him, in the communion of the Church of his fathers, the Chief Justice peacefully died, leaving to this Commonwealth an example of the only true success—its foundation stone severe mental discipline and lofty ideals.

STATUTORY CHANGES IN NORTH CAROLINA LAW IN 1924

ATWELL CAMPBELL McINTOSH
PROFESSOR OF LAW
ROBERT HASLEY WETTACH
ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA

The acts of the General Assembly which met in special session in August, 1924, have just been published, and it may be of some advantage to call attention to some of the laws of general importance then enacted.*

ADMINISTRATIONS

Ch. 43 amends C. S., sec. 24 by adding a provision for issuing letters of collection in case of probable death.

When there is delay in producing positive proof of death, where a person has disappeared under circumstances indicating that he may be dead, any person interested in his estate, "as heir at law, prospective heir at law, creditor, next friend, or any other person interested, either directly or indirectly," may apply to the clerk of the county in which such persons resided, or if he were a non-resident, in the county "in which any property was or might have been located at the time of such disappearance," for the appointment of a collector for the estate. The petition shall state the circumstances attending the disappearance, it shall be verified and also be supported by the affidavits of persons having knowledge of the circumstances. If the clerk is satisfied that the person is probably dead, he shall so find, and issue letters of collection to some discreet person or persons for the protection and preservation of the property.

Under the former law, letters of collection were issued only in case of delay in the probate of a will or in a controversy as to who was entitled to administration, there being no question as to the death.[1] Under the amendment, letters of collection are issued for the protection of the estate because there is some delay in establishing the death, while there may be no controversy as to the person

* Throughout this article, the abbreviation "Ch." will always refer to a chapter of the Public Laws of North Carolina, Extra Session, 1924. The abbreviation "C.S." refers to Consolidated Statutes of North Carolina (1919).

[1] C. S., secs. 24 to 27.

entitled to administration. Administration upon the estate of a living person is held to be a nullity.[2] The purpose of the amendment is to authorize the appointment of some one temporarily to protect the estate either for the benefit of the person supposed to be dead or for those who would succeed to his right.

Ch. 3 amends C. S., sec. 80 in regard to parties to a petition to sell land for assets.

The original section requires the heirs and devisees to be made parties to the proceeding, and the amendment provides that if the names and residences of any of the heirs are unknown, they may be joined as parties under the general designation of "unknown heirs of....." Summons is to be served by publication, and the court shall appoint a guardian *ad litem* to answer the petition and otherwise defend the rights of such unknown parties.

It has been held by the Supreme Court that generally the designation of the parties to an action as "the heirs of M." is insufficient.[3] Provision has been made for the joinder of unknown parties in a special proceeding for partition,[4] and for the sale of estates subject to contingent interests,[5] and this amendment makes the same practice apply in the sale of land for assets. The Code of Civil Procedure provides for the service of summons by publication upon unknown parties who are interested in real estate as the subject of a civil action, and in actions to foreclose mortgages on real estate;[6] and the same rules of procedure apply in special proceedings;[7] so that the case of unknown parties seems to be provided for under the general law. It places the question beyond controversy, however, to have it specially provided for in the cases mentioned.

A. C. M.

CHILD LABOR

C. S., secs. 5031-5038 provide for the regulation of child labor. C. S., sec. 5031 creates the State Child Welfare Commission, whose duty it is to make and formulate rules and regulations for enforcing and carrying out the provisions of the statutes concerning child labor.

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[2] *Springer* v. *Shavender* (1895) 116 N. C. 12, 21 S. E. 397; s. c. (1896) 118 N. C. 33, 23 S. E. 976.

[3] *Kerlee* v. *Corpening* (1887) 97 N. C. 330, 2 S. E. 664.

[4] C. S., sec. 3218, 3245; *Thompson* v. *Rospigliosi* (1913) 162 N. C. 145, 77 S. E. 113.

[5] C. S., sec. 1744; *Ryder* v. *Oates* (1917) 173 N. C. 569, 92 S. E. 508.

[6] C. S., sec. 484, 6, 7.

[7] C. S., sec. 752.

Ch. 74 substitutes for C. S., sec. 5032, a new section, providing:

1. No child under fourteen shall be employed or permitted to work in or about or in connection with any mill, factory, cannery, workshop or manufacturing establishment.

2. No child under fourteen shall be employed or permitted to work in certain specified employments, such as a laundry, bakery, office, hotel, garage, street trade, etc., except in cases and under regulations prescribed by the State Child Welfare Commission.

Such things as canning clubs or vocational classes are excepted.

C. S., sec. 5033 prohibits night work (from 9 P. M. to 6 A. M.) for any person under sixteen in any of the above mentioned occupations and in any quarry or mine at any time. Ch. 74 adds to this section that no child under sixteen shall be employed except in cases and under regulations prescribed by the Commission, when

1. Such child has symptoms of disease contributory to retardiation or disability; or

2. When determined by physical examination that employment of such child is injurious to its health; or

3. Employed when surrounding conditions are injurious to its morals; or

4. Employed when dangerous employment hazards are present.

It seems desirable that there should be a limitation of hours of labor for all persons under sixteen.

Ch. 74 inserts a new section for C. S., sec. 5034, making it unlawful to employ children under sixteen in ways enumerated by this act, unless, at the time of employment, the employer shall procure, rely upon and file a certificate provided for by the Commission, showing that the employee is of legal age and that the rules of the Commission have been complied with. The possession of such certificate is prima facie evidence of the employer's compliance with the law.

The violation of these provisions or of the rules and regulations made by the State Child Welfare Commission is made a misdemeanor. Especially noteworthy in this legislation is the concentration of power in the State Child Welfare Commission. This Commission is given legislative powers, that is, it can make laws, rules for future action, the violation of which is punishable by fine or imprisonment or both. Yet there is no doubt that this violation of the doctrine of separation of powers is constitutional. It has been going on in this country for a long time. The Corporation Commission, with its legislative, judicial and executive powers, is one of the familiar

instances in North Carolina. There are many other administrative bodies, whose activities prove that the separation of powers is more or less of a legal fiction in practical politics.[8] The State Child Welfare Commission can make rules and regulations to govern child labor, the violation of which is a misdemeanor. This Commission is further under a duty to execute and administer such rules and the provisions of the statutes. This is in accord with the modern tendency of legislatures to outline matters of policy and leave to an expert body, the power to fill in the details and make the law effective and workable. These duties alone should keep the State Child Welfare Commission busy.

R. H. W.

CONSTITUTIONAL AMENDMENTS

It now seems to be an established procedure for certifying amendments to provide in each proposed amendment that it shall be the "duty of the Governor of the State to certify said amendment under the seal of the State to the Secretary of State, who shall enroll the said amendment so certified among the permanent records of his office." As was noted by the late Dean McGehee, this is a valuable addition and facilities the proof of the amendment and of the time when it became effective.[9] It resembles the method of certification of amendments to the Federal Constitution by the Secretary of State, who certifies that the amendment has become a part of the Constitution, i.e., the date of its adoption by the legislatures of three-fourths of the states.

Ch. 31. This was the amendment to raise the salaries of the members of the General Assembly, but since it was defeated by popular vote, it is evident that the people, having twice opposed a raise of pay for legislators, regard the law makers as receiving enough for their services, although the present scale seems to be too low.

Ch. 33. This chapter is the "Port Terminals Bill," which was submitted to popular vote, not as a constitutional amendment, but because of its large significance to the State. Its defeat at the polls precludes further need for discussion at this time.

Sinking Fund Amendment—Ch. 91 inserts a new section, which, having been approved by popular vote, is now Section 30 of

[8] Such as the Interstate Commerce Commission, the various state Industrial Commissions, Workmens Compensation Boards, etc.

[9] 1 N. C. L. Rev. 269.

Article II of the Constitution of North Carolina and provides that a sinking fund for the retirement of bonds shall never be used for any other purpose. In this way, the people are able to tie the hands of the General Assembly against a future lapse.

Exemption from Taxation of Homes and Homestead Notes —Section 3 of Article V of the Constitution exempts homestead notes from taxation if the purchase price of the homestead is under $3,000 and the notes run not less than five nor more than twenty years with interest at 5½ percent. Ch. 115 substitutes a new section for the above, and it is now a part of the State Constitution. It exempts from taxation 50 percent of notes and mortgages given in good faith "to build, repair or purchase a home," if the amount does not exceed $8,000, nor the interest thereon exceed 5½ percent, nor the notes and mortgages run for less than one or more than thirty three years, provided the holder of the notes resides in the county where the land is and there lists it for taxation. A further proviso, if all of the above conditions are met, exempts the owner of the home from taxation for 50 percent of the value of said notes and mortgages. The home includes lands and buildings bona fide intended to be used as a dwelling and actually so used and occupied.

As a practical measure, it is doubtful whether much benefit will result. In some counties, the town and county taxes are over 2 percent. For instance, let us suppose X builds a home worth $10,000. He puts a $6,000 mortgage on it. If he can find a money lender in his county who will loan $6,000 on a mortgage at 5½ percent and who returns this $6,000 for taxation, all is well and good for X. The money-lender would receive as interest $330 per year, but he would pay taxes (say 2 percent) on $3,000, or 50 percent of his loan, which would amount to $60 and net him $270 income on his $6,000 or 4½ percent. The home owner would pay $60 less in taxes, his valuation for taxation being reduced by $3,000, one-half of the mortgage. The law is all in favor of the home owner, but there are not many kind-hearted people loaning money at 4½ percent today. In order to get a 6 percent loan, bonuses and charges of various kinds are paid to money-lenders. The rate of interest on securities is advancing gradually. A 4½ percent investment on a long time mortgage, with further deductions for state and federal income taxes, will probably have little appeal to the man or company with money to loan.

R. H. W.

CONVEYANCES, PROBATE AND REGISTRATION

Ch. 64 amends C. S., sec. 3333, validating deeds made by officers in the discharge of their duties, where the seal had not been used.

It was decided by the Supreme Court that a deed executed by the sheriff for land sold for taxes was invalid without a seal, although he used the form specified in the statute which did not have a seal.[10] In 1907 an act was passed validating all such deeds made prior to January 1, 1895, but not applying to actions pending at the time of its enactment. In 1917 this was amended by changing the date to include such deeds executed prior to January 1, 1910. The recent act re-writes the section and makes it apply to all such deeds executed prior to its enactment, August 22, 1924, but it does not apply to pending actions.

Land Registration—Ch. 40 amends the Torrens Act[11] by providing an additional method of conveying land which has been registered under the act. When the owner of such land desires to convey the same by ordinary deed, mortgage, or deed of trust, instead of in the manner required by the act, he may present to the register of deeds his certificate of title and have entered on the margin of the certificate and of the record a statement, signed by him and by the register, to the effect that the land is released from the manner of conveyance required by the act, and thereafter the land may be conveyed as if it had not been so registered.

Ch. 41 makes a similar provision validating deeds which have already been executed for land registered under the act.

Certain Probates Validated—Ch. 68 validates the probate of deeds of trust and mortgages executed to banking corporations, where such probate was taken prior to January 1, 1924, by a probate officer who was also an officer, director or stockholder of the bank.

Ch. 108 makes the same provision as to deeds of trust and mortgages to building and loan associations, where the probate was taken prior to August 10, 1924, and the probate officer was an officer or stockholder in the association; and the order of registration made by a clerk or his deputy who was an officer or stockholder is declared to be valid. These two acts do not apply to actions pending at the time of their ratification.

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[10] *Patterson* v. *Galliher* (1898) 122 N. C. 511, 29 S. E. 773; *Strain* v. *Fitzgerald* (1901) 128 N. C. 396, 38 S. E. 929.

[11] C. S., sec. 2405 to 2417.

Somewhat similar curative statutes are found in Consolidated Statutes.[12]

Registration Upon Affidavit—Ch. 56 amends C. S., sec. 3310 by changing the date therein named from 1885 to 1890. This section provides for the registration of deeds executed prior to the date mentioned, by making an affidavit that the grantor and witnesses are dead or cannot be found and that their handwriting cannot be proved, and that affiant believes that the deed was bona fide executed.

Extension of Time for Registration—Ch. 20 provides that for all grants and other instruments required by law to be registered within a certain time, the time shall be extended to the first day of September, 1926. This act is general in its terms, but it applies more particularly to grants from the state, since it has been held that the Connor Act does not apply to such grants. The time has been extended from time to time by similar acts, as had been done for all deeds prior to the Connor Act.[13].

A. C. M.

CORONERS

Ch. 65 re-writes Ch. 20 of Consolidated Statutes, in regard to Coroners, and prescribes in more complete detail their powers and duties. The more important changes in the wording of the statue are as follows:

In case of a vacancy, the clerk of superior court appoints a coroner to hold office until a successor is elected and qualified, and no special coroner is to be appointed for an inquest unless, in the opinion of the clerk, there is not sufficient time to select a suitable person to fill the vacancy.

In making inquests, it is the duty of the coroner to make a personal investigation, upon information that a person has probably come to his death through the fault of some other person, and he shall not summon a jury if he is satisfied that there is no blame attached to others for the death. He shall make a record of his investigation and report the same in writing.

If it appears that any one was to blame, the coroner shall summon a jury "of six good and lawful men, freeholders, who are otherwise qualified to act as jurors, who shall not be related to the

[12] C. S., sec. 3343, 3344, 3345, 3346. Vol. 3, 3366 (g), (h).

[13] C. S., sec. 3309, 7579, 7593. *Wyman* v. *Taylor* (1899) 124 N. C. 426, 32 S. E. 740.

deceased by blood or marriage, or to any person suspected of guilt in connection with such death," and shall proceed to make inquiry as to the cause of the death; and for that purpose he may cause such persons as may be necessary to appear before the jury. If upon such inquiry it appears that any one is to blame for the death, the coroner shall issue a warrant to have such person brought before the jury, and the investigation shall proceed as in other cases of preliminary investigation before a justice of the peace, by ascertaining probable cause, commitment, etc., and no further preliminary investigation shall be necessary.

The coroner is also required to notify the solicitor of the district when he considers an investigation necessary, and the solicitor or some one designated by him, counsel for the family of the deceased and counsel for the accused are entitled to participate in the hearing. He may also summon a physician, if he thinks it necessary, or at the request of the solicitor, or counsel for the accused, or a member of the family of the deceased. If the coroner is himself a physician, he may make the investigation.

The inquest shall begin where the body of the deceased may be, but may be adjourned to other times and places. Process for parties, witnesses and jurors may be issued by the coroner and served by the sheriff, and process may issue to another county under the official seal of the coroner.

The provisions as to election, term of office, official oath and bond, and the duty to act as sheriff where the sheriff is interested or there is a vacancy, remain as before.

A. C. M.

CORPORATIONS

Ch. 80 is a new sort of statute in North Carolina making it unlawful for any railroad company, incorporated in North Carolina or operating a railroad in this state, to engage in any business other than the business authorized by its charter. This is made a misdemeanor, punishable by fine.

From the precise wording of the section, it does not seem to apply to an isolated ultra vires act by a railroad company, as the statute mentions only "to engage in any business." The law as to ultra vires transactions is found in the decisions of our courts. In general, it is ultra vires of a corporation to carry on a business which is not fairly within the scope of the business described in its charter.[14] A stockholder may enjoin or set aside any acts which

do not conform to those limits. Thus a railroad company could not manufacture and sell electric power.

Under the doctrine of implied powers, it is uncertain just what a railroad company may lawfully do, although it is clear that it may do many things not specified in its charter.

In light of the above considerations and others, it is hard to say just what the new statute means. It may be that single, ultra vires acts are to be punished by fine. It may mean that only the doing of some business other than that specifically authorized by its charter is punishable. It may mean that the doing of business which comes within the scope of the corporation's implied powers is not to be punished, or it may intend to punish the doing of any business not within its express powers. Adding a criminal sanction to ultra vires action does not seem to help much in the present state of the law on that confused subject. R. H. W.

COUNTIES AND MUNICIPAL CORPORATIONS

Limitation of Bond Issue—Ch. 97 amends the acts of Extra Session, 1920, c. 3, s. 6.[15] The original act imposed a general limitation of bonded indebtedness for the counties not exceeding five per cent of the assessed valuation of property for taxation. The amending act extends the limit to eight per cent where the tax valuation does not exceed $10,000,000; and to seven per cent where the tax valuation is between $10,000,000 and $20,000,000.

Ch. 113 amends the acts of 1923, c. 143, s. 4,[16] by limiting the amount of bond issue by the county for courthouse and jail to two per cent of the tax valuation, instead of one per cent as in the original act.

Municipal Condemnation of Land for Street Improvement—Ch. 107 amends acts of 1923, c. 220, s. 2, which provides a method for acquiring additional land for street improvement. The amendment act provides that where fifty per cent or more of the cost of the improvement is to be assessed against the property in a certain assessment district, a petition must first be filed with the governing body, signed by a majority in number of the property owners and representing a majority of the street frontage in the proposed district.[17] A. C. M.

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[14] Cook, Principles of Corporation Law, p. 449 et seq.
[15] C. S. Vol. 3, s. 1291 (a).
[16] C. S. Vol. 3, s. 1321 (b).
[17] C. S. Vol. 3, s. 2792 (b).

COURTS AND CIVIL PROCEDURE

SPECIAL TERMS—Ch. 100 amends C. S., sec. 1450, by authorizing the Governor to order "a special term of court to be held in any county or district during the holding of a regular term of the superior court in such county or district, either by a judge of the superior court or by an emergency judge, if the dispatch of business requires it." The purpose of the amendment is not entirely clear, since the original statute already authorizes the Governor to order a special term to be held in any county, when necessary, and to designate a judge, including the emergency judges, to hold the court.[18]

COUNTY COURTS—The act of 1923, c. 216, which provides for the establishment of a system of county courts, is amended in some particulars by Ch. 85.

The county commissioners are authorized to establish such court without submitting it to a vote of the people, and also to discontinue the court when, in their opinion, it is no longer necessary. The discontinuance is to be at the expiration of the terms of office of the judge and solicitor, unless such officers consent.

In addition to the jurisdiction already conferred, the court is given concurrent jurisdiction with special courts in cities and towns in the county. When the court is established, the clerk is to transfer from the docket of the superior court to the county court all such criminal cases as are within its jurisdiction; and the judge at term may, on motion and notice, transfer cases to the county court. In criminal cases in the county court the defendant may demand a jury trial without depositing the jury fee.

The act also authorizes the commissioners to appoint the judge and solicitor and to fix the term of office and salaries, and they need not be elected by popular vote. It also removes the restriction upon the judge to engage in the practice of law.

PARTIES—Mention has already been made of joining "unknown parties" in a petition to sell land for assets.

Ch. 110 provides that an action for the penalty imposed by law for holding two offices may be brought only by a bona fide resident of the county in which the defendant resides.[19]

VENUE—Ch. 62 provides that in partition proceedings, where the tract of land lies in more than one county, or there are several tracts

[18] C. S., sec. 1450; Vol. 3, s. 1435 (a).

in different counties, the proceeding may be brought in any county in which a part of the land is situated, with same effect as if all of the land were in such county. Where commissioners are appointed to make partition, the court may appoint such additional commissioners from the other counties as may be deemed necessary.[20]

PLEADINGS. FILING REPLY—Ch. 18 makes a very important amendment to acts of Extra Session, 1921, c. 92, s. 1, subsec. 4.

The Crisp Act of 1919 made no special provision for the time for the plaintiff to file a reply to the defendant's answer, but the Consolidated Statutes adopted the same time, twenty days, as for filing an answer.[21] The act of Extra Session of 1921 changed the time to ten days.[22] The present act provides that if the answer contains a counterclaim and a copy of the answer is served upon the plaintiff or his attorney, a reply must be filed within twenty days thereafter. For good cause the clerk may extend the time to a day certain. If the answer contains a counter claim and no copy is served upon the plaintiff or his attorney, then the counterclaim shall be deemed to be denied, as fully as if a reply had been filed. In all other cases replies may be filed within twenty days from the filing of the answer. The clerk or the judge, when the cause has been transferred to the civil issue docket, may, for good cause, extend the time to a day certain.

This amendment went into effect on the first day of January, 1925.

A. C. M.

CRIMINAL LAW

MOTOR VEHICLES—C. S., sec. 2617 provides for the ordinary rules of the road in passing, keeping to the right, signaling with outstretched hand, etc. Ch. 61 adds to this section two new provisions: first, that when an operator of a motor vehicle meets an approaching vehicle, he shall pass to the right, which means that the vehicle and its load shall be on the right of the center of the road, and second, that an operator of a motor vehicle shall permit all vehicles approaching from the rear to proceed without hindrance by turning to the right, i.e. the vehicle and its load shall be on the

[19] C. S., sec. 447, 3201.
[20] C. S., sec. 463 (2), 3214, 3219.
[21] C. S., sec. 524.
[22] C. S., Vol. 3, s. 524.

right of the center of the road, and by proceeding at a rate of speed not exceeding the speed limit. Violation of this is punishable by fine up to $50.00 and imprisonment not exceeding thirty days.

This statute is clearly aimed at "road hogs" and the large-sized trucks with their tremendous loads and should serve to protect the ordinary driver from the danger of meeting "road hogs" and big trucks and busses. Since failure to turn to the right is negligence,[23] a similar failure to keep to the right of the center of the road should likewise be held to be negligence or such a violation of statute that it gives rise to a right of action against the offender, if such violation is the proximate cause of the injury.

Ch. 63 makes it unlawful for any person to display on his motor vehicle the emblem or insignia of any organization, lodge, fraternity, etc., unless he is a member of the same. This will aid in preventing the display of such insignia as physicians use, as well as preventing a promiscuous carrying of fraternal insignia.

Protection of Highways and Adjacent Property—Ch. 54 makes it a misdemeanor for any person, not on his own lands, within 100 yards of any public road or highway, wilfully to commit any damage, injury or spoliation to or upon any tree, wood, timber, garden, crops, plants, lands, springs, or any other matter or thing growing or being thereon or to cut or injure any tree, plant or flower or deposit any trash, garbage, litter, etc. within such limits. It is hoped that this law may prevent the laying waste of gardens, flowers, etc. by tourists who are not in the habit of regarding another's property rights and who usually leave trash and garbage at every place they stop to eat.

Ch. 109 prohibits the posting of any advertisement on trees, poles, etc. without the owner's consent, and putting such ads on danger signals, guide posts, etc. within the limits of the public highway. The first part of the section seems to apply to ads put up anywhere on private property, while the second part applies to those put up within the limits of the public highway, where no consent can be obtained for the posting of advertisements.

Sale of Non-Mailable Publications—Ch. 45 makes it a misdemeanor for any news-dealer, book seller or any other person, firm or corporation to offer for sale, sell or cause to be circulated in North Carolina any magazine, periodical or other publication now

[23] *Goodrich* v. *Matthews* (1919) 177 N. C. 198, 98 S. E. 529.

or hereafter excluded from the U. S. mails, nor to offer for sale, sell or give away any such publication to any person under twenty-one years of age.

While this statute seems to be aimed at preventing the sale and distribution of obscene literature, it applies to all non-mailable matter, such as newspapers excluded from the mails during the war for political reasons or otherwise. It is specified that the act shall not be construed as conflicting with or abridging the freedom of the press, and the act clearly comes within the scope of the state police power. R. H. W.

ELECTIONS

Australian Ballot—Since there is considerable discussion in this State relative to the adoption of a state-wide Australian ballot law, it is interesting to know that there is now such a law in eight counties, which are thus serving as experiment stations for the State. Ch. 37 provides for the Australian ballot in the counties of Stanly, Brunswick, Alexander, Yancey, McDowell, Cherokee, Surry and Caldwell. R. H .W.

MORTGAGES AND LIENS

Commission on Mortgage Loans—By ch. 35, a commission of not exceeding 1½ percent is authorized on mortgage loans running not less than nine years. As has already been mentioned above, there is a rather common practise existing of charging fees and bonuses for the lending of money, so that the legal rate of interest is being exceeded. This statute allows an overcharge of not more than 1/6 percent per year on a long time loan as a commission for loaning the money and seems to be entirely reasonable.

Federal Tax Liens—By act of Congress, it is provided that there shall be a lien in favor of the United States against any person who, being liable to pay any federal tax, shall neglect or refuse to pay the same after demand. The lien attaches from the time the assessment list is received by the collector until paid, with interest and penalties accrued, upon all property and rights to property belonging to such person. It is provided that such lien shall not be valid against any mortgagee, purchaser or judgment creditor until notice of the lien is filed in the office of the Clerk of the District Court of district wherein the property is situated. It is further provided that whenever a state, by appropriate legislation, authorizes the filing of such notices in the office of the recorder or register of deeds,

then the lien shall not be valid as to mortgagees, etc. until such notice is filed in the register's office of the county where the property subject to the lien is situated.

Ch. 44 provides for the filing of liens for federal taxes and also for certificates discharging such liens in the office of the register of deeds of the county within which the property subject to such lien is situated. This carries out the federal statute and protects the purchaser of property, the mortgagee and the judgment creditor, by enabling them to find a record of liens for federal taxes in the register's office of the county where the land, in which they are interested, is situated. R. H. W.

POLICE REGULATIONS

MEAT INSPECTION—C. S., sec. 4762 provides against the sale of unsanitary meat by making it unlawful for any person to sell meat which has been slaughtered, prepared or kept under unsanitary conditions, such as delapidated slaughter house, insufficient drainage, filthy pools or hog-wallows near slaughter house, impure water supply, bad-smelling storage rooms or refrigerators, etc. Peace and health officers may seize meat found under such conditions and the owner may be fined and the meat destroyed.

The above law continues in force and meets a condition where regulation is very necessary. Ch. 11 provides for the regular inspection of meat packing plants in North Carolina where more than 1,000 beef cattle, 10,000 hogs or 500 sheep are slaughtered per year. The inspector may condemn or approve the meat and stamps it accordingly.

This new statute is undoubtedly important, but the older statute is the one which comes closer to the consumer in North Carolina in protecting him against unsanitary meat.

This power of the inspector to condemn and order the destruction of meat found to be unfit for human consumption, like the similar power of health and police officers under C. S., sec. 4762, may give rise to some difficulties in case the packer or butcher believes that the meat is good and has been improperly destroyed.

There are three remedies available. In case the meat has not been destroyed, but simply condemned, the packer might seek to stop the destruction by an injunction or try to recover the condemned meat by an action of claim and delivery. But after the destruction of the meat, the only redress is against the inspector or the health

or police officer for the value of the meat destroyed. This is the effect of *Daniels* v. *Homer*,[24] where certain fish nets were unlawfully used by the plaintiff, and the defendant, an assistant oyster commissioner, seized the nets and proposed to sell them to pay costs. The action to prevent the sale was decided in defendant's favor, as it was admitted that the nets were being unlawfully used when seized.

But if property is destroyed, under such police regulations as the above, before the owner takes any steps to protect himself, it is clear that due process of law requires that he have his right of action for the value of the destroyed article.[25] Thus unfit meat may be destroyed without giving the owner a hearing or trial beforehand This is true even if the meat has a value independent of its food value, as for fertilizer. This exercise of the state's police power is reasonably necessary for the public health and is constitutional.

Whether the right to destroy or forfeit private property for violation of law should properly be left to the police power in executive hands or whether it requires judicial proceedings with notice beforehand, is generally resolved in favor of the police power in such cases as the above where the public health is concerned. There are objections[26] to this, but it is usually agreed that such administrative action under the police power is within the scope of due process, as long as there is opportunity to be heard in an action for damages after the destruction.[27]

In such an action for damages, the plaintiff may recover if the jury finds that the defendant official acted wrongfully, although in good faith. It may be observed that this is putting a price on free administrative action. Competent officials, who use their best judgment and act in good faith in destroying property under the police power, should not be subject to personal damages if the jury thinks they acted wrongfully, as by finding that meat was not unfit for human consumption. It seems that the law should protect officials against this and thus encourage honest administrative action. This might be done if the State provided for the payment, from public

[24] *Daniels* v. *Homer* (1905) 139 N. C. 219, 51 S. E. 992.

[25] *Cold Storage Co.* v. *Chicago* (1908) 211 U. S. 306, 29 Sup. Ct. 101; *Lawton* v. *Steele* (1894) 152 U. S. 133, 14 Sup. Ct. 499; *Miller* v. *Horton* (1891) 152 Mass. 540, 26 N. E. 100.

[26] McGehee, *Due Process of Law*, p. 377; Freund, *Police Power*, p. 525.

[27] Cases in note 2, supra.

funds, of damages to owners of private property improperly destroyed through bona fide administrative action under the police power.

Sale of Drugs—C. S., sec. 6667 prohibits the sale of drugs without a license and regulates the drug trade. It excepts from the requirement of a license physicians who compound their own prescriptions, also the sale of non-poisonous domestic remedies and patent medicines containing no poisonous ingredients.

Ch. 116 adds to these exceptions a list of some thirty drugs and remedies, such as paregoric, aspirin, bicarbonate of soda, calomel, castor oil, camphor, etc. These may be sold by anybody without a pharmaceutical license, provided there is no established drug store in the same town. The act does not apply in twenty-six counties, which further restricts it.

Since most of the list of drugs named are harmless in ordinary use, it may be safe enough to allow the small, country store-keeper to sell them, but the statute makes an opening which might lead to worse things. There may be a question whether paregoric, a strong narcotic, should ever be sold except upon a doctor's prescription. Similarly with other drugs in the list. It seems that the legislature would have done better to leave the details of drug-selling to the State Board of Pharmacy or to some other expert group, who understand the nature and effect of drugs and the danger involved in allowing them to be sold by anybody.

Forest Fires—Ch. 119 authorizes the Insurance Commissioner to appoint two deputies to investigate forest fires and try to fix responsibility and begin prosecutions against those deemed guilty. This is of great value in protecting our forests against fire, but what is needed is a real policy of forest conservation. R. H. W.

RECEIVERS

Ch. 13 provides that receivers of a corporation, who are directed to sell property pending the litigation, may be authorized to report the sale to the resident judge or to the judge holding the courts of the district for confirmation. Notice shall be given to creditors and others interested by publication in a newspaper for at least ten days before the time fixed for the hearing; and the judge may confirm the sale or order a resale, as if the hearing were at a regular term.[28]

A. C. M.

[28] C. S., sec. 360, 1214.

The
North Carolina Law Review

Volume Three | February, 1925 | Number One

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Published in February, April, June and December, for The School of Law, by the University of North Carolina, Chapel Hill
The University of North Carolina Press

NOTES AND COMMENTS

THE LAW REVIEW—With this issue, THE NORTH CAROLINA LAW REVIEW enters a new course, which it is hoped will be of service to the lawyers of North Carolina, to law students and to all interested in the legal development of this State. We hope that THE LAW REVIEW will continue to prove interesting to many readers outside of North Carolina, as it touches upon problems that are not limited by state lines. But it is certain that the majority of readers will be North Carolina lawyers, and much of the material in THE LAW REVIEW will have a connection with North Carolina legal problems. There will be articles of general interest to the legal profession everywhere, there will be discussions of particular topics of law and critical comments on current legislation and on recent decisions of our own and other courts of last resort. If THE LAW REVIEW can be of any help to practising lawyers and to others interested in the law, by analyzing and explaining the changes reflected in judicial decisions and legislation, it will render a sufficient service to justify its existence.

The first issue of THE NORTH CAROLINA LAW REVIEW appeared in June 1922, and it has been published quarterly since that time on a subscription basis. But it was not reaching all the lawyers in this State, as had been expected, and so was not rendering such service as we believe it can. The present plan, as long as it can be maintained, is to place on the subscription list, without charge, every lawyer in North Carolina who is interested enough to request us to send him THE LAW REVIEW. In order to do this, the size of our magazine was reduced, but it is intended to keep up the standard of the material which will appear in our pages.

We hope that THE LAW REVIEW will be the medium through which may be expressed the attitude, the needs and the problems of the lawyers and judges in active practice. Those who are daily carrying on the legal work of the State must have some definite reactions to, and also constructive suggestions for dealing with, the difficulties met in the practical administration of justice through law. Contacts between the lawyer, the judge, the law student and the law teacher are needed in order that there be a basis for the legal profession as a whole to render real public service. Such coöperation we hope to have with THE NORTH CAROLINA LAW REVIEW.

REASONABLE USE OF PERCOLATING WATERS—It is one of the elementary truths, firmly fixed in the Common Law, that the water of a natural watercourse is not the subject of ownership.[1] In this respect, it may be classified with light, air, or ferae naturae, which are not private property until appropriated, used, or reduced to control.[2] Thus, while the landowner through, or past, whose premises the watercourse runs may take it from the stream and into his possession by introducing it into a pipe or aqueduct, or by storing it in a reservoir,[3] and thus acquire ownership as of personal property,[4] in its original state in the watercourse he is regarded as merely having the use of, and not an absolute property right in, the water. He is

[1] *Tracey Development Co.* v. *People,* (1914) 212 N. Y. 488, 106 N. E. 330. See also article by Samuel C. Wiel in 22 H. L. R. 190.

[2] *Vernon Irrigation Co.* v. *Los Angeles,* (1895) 106 Cal. 237, 39 Pac. 762. The Institutes of Justinian recognized running water as common property: "Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea shore." Just. lib. II, tit. 1,—translation by J. B. Moyle (5th Ed.) p. 35.

[3] *City of Syracuse* v. *Stacey,* (1901) 169 N. Y. 231, 62 N. E. 354, *Wallace* v. *City of Winfield,* (1916) 98 Kansas 651, 159 Pac. 11.

[4] *Hagerman Irrigation Co.* v. *McMurry,* (1911) 16 N. Mex. 172, 113 Pac. 823.

entitled to demand, as a "natural right," that upper and adjoining landowners allow the stream to flow as it has been accustomed to flow, but, since those owners have the same right, he is under a corresponding duty not to interfere with such flow in a manner which might jeopardize their interests.[5] Such is the doctrine of riparian rights at Common Law in England, and as adopted by the courts of this country.

In the case of percolating water, i.e. water percolating or seeping through the earth under the surface and in no fixed channels, the approach of our courts has been somewhat different. Just how far one landowner may go in preventing the passage of such water to adjoining land has been the subject of much discussion, and has resulted in a wide split of authority in the various American jurisdictions.[6] In general the authorities may be marshalled under two main heads: First, those which give to the landowner the absolute property in percolating water, together with the right to prevent its passage to adjoining land, and, second, those which deny such property right, supplying, in its stead, the doctrine of *reasonable use*. The first of these two positions has been termed the "English View," the leading case in point being *Acton* v. *Blundell*,[7] which was decided by the Exchequer Chamber in 1843. In that case, the defendant while carrying on mining operations on his own land in the usual manner, sunk certain shafts which drained the percolating water from the land of the plaintiff, resulting in the drying up of the plaintiff's well. The court held that the injury was *damnum absque injuria*, following literally the maxim of *cuius est solum, eius est usque ad caelum et ad inferos*,—the owner of the soil is owner to the sky and the depths,—"whether it (the land below his property) is solid rock, or porous ground, or venous earth, or part soil, part water . . ."[8] By its decision, the English court recognized that, in the case of percolating water, not only the right of user, but the corpus of the water, passed as absolute property with the soil itself.

[5] Goddard, *Easements*, (8th. Ed.) p. 84. See also Leake, *Uses and Profits of Land*, p. 148. The obligation to allow the water to flow in its natural state became a part of the Common Law under the maxim, *Aqua currit et debet currere ut currere solebat.*

[6] For discussion and citation of cases in the various jurisdictions, see Tiffany, *Real Property*, (2nd. Ed.) p. 1175 *et seq.* Also 27 R. C. L. ("Waters") par. 91.

[7] 12 Meeson & Welsby 324. See *Chasemore* v. *Richards*, 7 H of L Cas. 349, 1 Eng. Rul. Cas. 729, and note.

[8] *Acton* v. *Blundell*, supra, p. 353.

Numerically, perhaps over one-half of the decisions on the question in the United States have followed the lead of *Acton* v. *Blundell* in declaring that the landowner has an absolute property in the water under his land, and may use it as he sees fit, irrespective of the hardship to adjoining landowners.[9] The courts supporting this view have taken the position that the percolating water is a part of the corpus of the soil itself, and not a separate substance subject to riparian rights, or to the rules of use applied in the case of water in watercourses on the surface of the land. Opposed to the line of authorities supporting the English view is an ever-growing group of decisions in favor of the "American Doctrine"[10] of *reasonable use*. A definition of *reasonable use* was made by one court as follows: "While the owner of land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with a beneficial use of the land, especially if such use in excess of the reasonable and beneficial use is injurious to others who have substantial rights to the water."[11] A great majority of the later American cases are in accord,[12] although the Supreme Court of Virginia, as late as 1921, followed the English View.[13]

In the recent case of *Rouse* v. *City of Kinston,*[14] the facts were these: The plaintiff, a resident of Kinston, purchased two tracts of land known as the "Caswell Lodge Plantation" and the "Ginhouse" tract. On both of these properties the water was bad, being both

[9] *Hanson* v. *McCue,* (1871) 42 Cal. 303, 10 Am. Rep. 299; *Houston & T. C. R. Co.* v. *East,* (1904) 98 Tex. 146, 81 S. W. 279; *Roath* v. *Driscoll,* (1850) 20 Conn. 533, 52 Am. Dec. 352 and note; *Elster* v. *City of Springfield,* (1892) 49 Ohio St. 82, 30 N. E. 274; *Hunte* v. *Laramie,* (1919) 26 Wyo. 160, 181 Pac. 137; *Huber* v. *Merkel,* (1903) 117 Wis. 355, 94 N. W. 354; *Chase* v. *Silverstone,* (1873) 62 Me. 175, 16 Am. Rep. 419; *Stoner* v. *Patten,* (1909) 132 Ga. 178, 63 S. E. 897; *Lybe's Appeal,* (1884) 106 Pa. St. 627, 51 Am. Rep. 542; *McCarter* v. *Hudson County Water Co.,* (1906) 70 N. J. Eq. 695, 65 Atl. 489.

[10] So called, perhaps, because the English Common Law Doctrine remains substantially unchanged. See *English* v. *Metropolitan Water Board,* (1907) 1 K. B. 588.

[11] *Midway Irrigation Co.* v. *Snake Creek Mining & Tel. Co.,* (1921) 271 Fed. 157, 162. (CCA. 8th. Circuit).

[12] *Smith* v. *Brooklyn,* (1899) 160 N. Y. 357, 54 N. E. 787; *Horne* v. *Utah Oil Refining Co.,* (1921) 59 Utah 279, 202 Pac. 815; *Katz* v. *Walkinshaw,* (1902) 141 Cal. 116, 70 Pac. 663,—rehearing affirming same (1903) 141 Cal. 128, 74 Pac. 766. Wiel on *Water Rights in Western States,* section 1066 and cases cited.

[13] *Heninger* v. *McGinnis,* (1921) 131 Va. 70, 108 S. E. 671. Also in accord is *Miller* v. *Black Rock Springs Imp. Co.,* (1901) 99 Va. 747, 40 S. E. 27.

[14] *Rouse* v. *City of Kinston,* (1924) 188 N. C. 1, 123 S. E. 482.

147119

unhealthy and not drinkable. After purchasing the land, which comprised almost six hundred acres, the plaintiff, at the expense of from $15,000 to $20,000, sank wells and procured deep artesian water on the premises. The City of Kinston purchased a half acre of land adjoining the large tracts of the plaintiff, and soon after began sinking deep wells thereon, and expressed its purpose to conduct water therefrom by a ten-inch main to the City. Contemporaneously with the sinking of the City's wells, two of the plaintiff's wells ceased to flow, and the flow of a third well was decreased from approximately 100 gallons per minute to only 8 gallons per minute. The City had also laid mains over the land of the plaintiff without purchase of an easement or condemnation of the property. The plaintiff was awarded $8,000 damages for the injury to his wells and $1,000 for the trespass caused by the laying of the mains. The defendant City assigned error, and appealed to the Supreme Court of North Carolina. The court found no error, and affirmed the judgment below. The opinion of the court was given by Clarkson, J., who, after an exhaustive review of the authorities, rejected the English View, and upheld the American doctrine of reasonable use of percolating water. Said the court, "We think there is no error in the charge of the court below as follows: 'This rule (that of *reasonable use*) does not prevent the private use by any landowner of percolating waters subjacent to his soil in manufacturing, agriculture, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining, or the like, although by such use the underground percolating waters of his neighbor may be thus interfered with or diverted; but it does prevent the withdrawal of underground waters for sale or distribution, for uses not connected with any beneficial ownership or enjoyment of the land from which they are taken, if it thereby follows that the owner of adjacent lands is interfered with in his right to the reasonable use of subsurface water upon his own land or if his wells, springs or streams are thereby materially diminished in flow, or his land rendered less valuable for agriculture, pasturage, or for legitimate uses. . . '." The court expressed the opinion that the English Rule, dependent upon ownership to the sky and depths, must fall before the maxim of *sic utere tuo ut alienum non laedas*.[15]

[15] The same result, on substantially the same facts, was reached in the case of *Meeker* v. *City of East Orange*, (1909) 77 N. J. Law 623, 74 Atl. 379. There it was held that a city which, for purpose of supplying its inhabitants with drinking water, sank on its land artesian wells, through which it drew out percolating water was liable in damages for injuries caused thereby to the adjoining owner

As suggested in the quotation from the charge in the lower court in the *Kinston case,* the application of the doctrine of *reasonable use* is tempered by a close analysis of the facts to determine whether or not the adjoining landowner is actually suffering an injury. This is well brought out by two recent cases of *Horne* v. *Utah Oil Refining Company*[16] and *Glover* v. *Utah Oil Refining Company.*[17] In the first case, over a hundred lots were irrigated by underground waters raised from an artesian basin. An oil company purchased a small lot in the vicinity and sunk wells whose operation seriously diminished the supply of the adjacent lot owners. The water so taken was to be put through a refinery in the district. The surrounding lot owners asked for an injunction, which was granted. The court, in its opinion, rested the result solely on the ground that there had been an unreasonable use of the percolating water on the part of the Company. The Company then purchased the water rights of over a hundred of the adjoining owners, and went ahead with its original plan. Then, in the *Glover case* which followed, one small lot owner, who had not sold out to the Company, asked for an injunction. She alleged that, when all of the original lot owners had used, on their lots in the district, their correlative portion of the percolating waters, she was entitled to 6.58 minute gallons for her lot; that, if the water intended to be drawn from the land by the Company which had purchased the rights of her neighbors were distributed rateably among all of the lots in the district, the plaintiff would be entitled to 15 minute gallons, and that she needed the increase over her original 6.58 minute gallons, which she admits the defendant's action would not impair. The plaintiff sought to enjoin the drawing of the water from the district on theory that it was not to be beneficially used for the tract on which the artesian basin was located. The Utah court held that, in such a case, as long as plaintiff's relative portion of 6.58 minute gallons was not interfered with, she had no cause for complaint merely on the basis of the use which the Company was to have for the water. The two cases taken together form an excellent basis for the sugegstion contained in the charge to the jury in the case of *Rouse* v. *City of Kinston,* that perhaps the doctrine of *reasonable* use has no application unless, by a use unconnected with the land from which the water is taken, the adjoining landowner is interfered with in the *then* beneficial use of

[16] (1921) 59 Utah 279, 202 Pac. 815.

[17] (1923) 62 Utah 174, 218 Pac. 955. Thurman, J., delivered the opinion of the court in both this case and the *Horner Case, supra.*

his premises. If such a conclusion is not sound, then it would appear that the position taken by the Utah court in the *Glover* case is untenable, since in the *Horne case,* the court rejected the idea of absolute property in the percolating water, resting its decision solely on the ground of unreasonable use, and then, in the sequel case, denied the plaintiff's right to a recovery, not on the ground that the use of the water by the Company was reasonable, but on the ground that the plaintiff's original share of the water was not diminished.

The two Utah cases raise an interesting question with regard to the future development of the doctrine of *reasonable use:* When the activity of the defendant fails to impair the *present* flow of the percolating water through the land of the plaintiff, but will result in cutting off the possibility of *future* improvements, will the courts extend the doctrine of *reasonable use* so as to protect such future development? Three separate situations are possible when the defendant is taking percolating water,—First, he may be taking it for use on his own land for purpose of immediate enjoyment of the land; second, he may be taking it for use in expansion or development of the resources of the land; and third, he may be taking the water for use at a distant place, or for a use totally unconnected with his own land from which it is drawn. It is quite obvious from a portion of the charge to the jury in the *Kinston case,* approved by the Supreme Court, that our court is unwilling to apply the *reasonable use* doctrine so as to interfere in the first of these situations. The present right to beneficial use of the water on the land of the person drawing the same appears to be paramount to the right of his neighbor to future increase in his supply.[18] The inference of the charge in that same case is that the doctrine of *reasonable use* will also permit the unrestricted use of the water in the second situation, i.e. for future development of the defendant's land.[19] But the court was of the opinion that the application of the doctrine would restrain the unrestricted use of the water by the defendant in the third of these situations,—for use unconnected with the beneficial use of the adjoining land from which it was drawn. The California court has

[18] See previously quoted portion of the charge: "This rule does not prevent the private use by any landowner of percolating waters subjacent to his soil in manufacturing, agriculture, irrigation, or otherwise . . ."

[19] *Ibid.*: "Nor does it prevent any reasonable *development* of his land by mining, or the like, although by such use the underground percolating waters of his neighbor may be thus interfered with or diverted; . . ."

likewise taken this position,[20]—one which would have been fatal to the contention of the defendant company in the *Glover case* had the Utah court seen fit to adopt it.

Although the decision in the *Kinston case* did not render their consideration necessary, in future applications of the doctrine of *reasonable use* there are two possibilities. Either our courts will apply the doctrine narrowly, and thus tend to swing back to the English Rule of *ownership* of the percolating water, at least for all purposes connected with the land of the person drawing the same,[21] or they will apply the doctrine broadly and limit it, roughly, to the same considerations which now apply to riparian rights on surface streams. The scarcity of ground water for purposes of irrigation and the supplying of drinking water alike, make the latter course by far the more desirable. Its adoption would mean a recognition of the right of each adjoining landowner to have percolating water flow as it has been *accustomed* to flow, free from unreasonable interference by the neighboring owners for *any* purpose. While the rules of riparian rights do not, because of the difference in subject matter, of necessity control underground waters, still it would undoubtedly clarify the doctrine of *reasonable use* to attach it to such a well-grounded and stable body of law as has arisen in connection with water rights on the surface.

F. S. R.

[20] *Burr* v. *Maclay Rancho Water Co.*, (1908) 154 Cal. 428, 98 Pac. 260. The court held that the right of a landowner to a quantity of percolating water necessary for *further* use on his own tract is paramount to that of the adjoining owner to take the water to distant land.

[21] The language of the Federal Court in *Midway Irrigation Co.* v. *Snake Creek Mining, etc. Co., supra,* tends to support this possibility even though the decision, perhaps, does not. See p. 162 of that opinion: "Subterranean and other waters on his land, *which thereby become a part of the realty . . .*"

In South Dakota it is expressly provided by statute (Comp. Laws, Section 2771) that subterranean water, not flowing in a definite channel, but percolating and seeping through the earth, is a part of the realty. The owner of land upon which a percolating spring appears, being entitled to the waters thereof, may recover damages from a person carrying them away. See *Metcalf* v. *Nelson* (1895) 8 S. D. 87, 65 N. W. 911.

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The
North Carolina Law Review

Volume Three April, 1925 Number Two

THE DEDICATION OF MANNING HALL

Manning Hall, the new law building at the University of North Carolina, is named in honor of Dr. John Manning, who was Dean of the Law School from its revival in 1881 until his death in 1899.[1] During Dr. Manning's administration, the Law School was quartered in a small, frame building, now used as the local telephone exchange. At Dr. Manning's death, the Law School was formally absorbed into the University and occupied rooms in the Old South building, from there moving into the old Library building in 1907. Judge MacRae was Dean of the Law School during this period and was succeeded by Lucius Polk McGehee in 1910. Mr. McGehee was tireless in his efforts to obtain a new building for the Law School, but died in 1923 before the building was ready for occupancy. In 1924, Merton L. Ferson was elected to the Deanship of the Law School.

Manning Hall is an impressive and graceful building in the colonial style with a portico rising the entire height of the building, supported by six Ionic columns. The outside material of the building is brick, finished with Indiana limestone. The interior finish is oak and marble. The building may be divided into three parts, a central section and two wings. The entrance on the main floor is into a lobby from which doors lead to the reading room of the Law Library, which occupies one wing of the first floor. Faculty offices, facing a hallway, occupy the other wing. The book stacks occupy the central portion of the building on the first floor and have a capacity of 30,000 volumes. On the second floor, there is a large classroom in each wing and a hallway and three small classrooms in the central portion. The combined seating capacity of the classrooms is about 300.

[1] An address by Justice W. J. Adams on the "Life and Influence of John Manning" has been published in the *North Carolina Law Review*, December issue, 1924.

The classrooms are fitted with rows of writing benches and loose chairs, thus providing comfort and convenience for class work and note taking. In the basement, there is a locker room, where students may keep books and other personal property. There is also a special room for women students on the first floor. Thus the Law Building is the exclusive workshop and home of the law students from the time that lectures begin in the morning until the building is closed at night. This provides the professional atmosphere for first class professional study and discussion, upon which the success of legal training so largely depends.

Manning Hall was formally dedicated on January 23, 1925 in the presence of a distinguished assemblage, including the members of the legislature, judges of the Supreme and Superior Courts, State officials, University trustees and other prominent citizens. President Chase of the University presided, and the principal speaker was Professor William Reynolds Vance of Yale.

The principal address and the other excellent addresses, delivered on the occasion of the dedication of Manning Hall, are printed in the following pages.

NEW VALUES IN LEGAL EDUCATION

WILLIAM REYNOLDS VANCE
PROFESSOR OF LAW, YALE UNIVERSITY

The lawyer is not an heroic figure in the public eye. This is natural enough, for on the comparatively infrequent occasions when the limelight of public attention is turned upon him, it usually shows him in an attitude not greatly to be admired. He is defending some person charged with a crime so heinous as to catch the public notice, he is supporting the claim of some unpopular corporation that is deemed opposed to the public interest, or instituting proceedings to collect an exorbitant fee from the estate of a dead man, a bankrupt or a corporation under receivership. The personal contacts of that curious person of small affairs pictured in the cartoons as "The Average Man," with the lawyer are too apt to be with bill collectors and ambulance chasers, those petti-foggers and shysters that cling to the body of the profession like the soiled fringe of a worthy garment.

Unhappily the serious work of the legal profession in its ceaseless task of maintaining order, in patient unloosing of the innumerable tangles in which the affairs of a forceful and restless people are constantly being thrown, or in preventing or adjusting conflicting business conditions, in working out plans for the reorganization of commercial and industrial methods, and in reforming and readjusting those rules of social coöperation which we call "the law" so that they may be suited to the ever changing social and economic conditions with which we are confronted—these activities at the bar and on the bench are wholly unknown to the public at large. Not only are they unknown, but they are in effect unknowable. The worthy achievements of the lawyer, with such rare exceptions as Patrick Henry's speech before the parsons, are neither dramatic nor obvious, while the powerful swatting of the Home Run King, or the clever pranks of a child movie actor, are both dramatic and obvious. Hence our "average man" is well acquainted with Babe Ruth and Jackie Coogan, but has no knowledge as to who are members of the Supreme Court of the United States or of the state in which he lives, or as to the real significance of those tribunals. Thus we see that the generally unfavorable attitude of the public toward the legal profession as an unknown body of men is not only natural but justifi-

able under the facts as they are known to the public. But the picture is not complete unless we set over against the public's attitude towards lawyers in general its regard for individual lawyers in particular. In choosing those to whom authority and power shall be entrusted, whether in public or private affairs, the public usually selects lawyers, thinking of them, however, as outstanding citizens fit to be trusted, rather than as lawyers. We pause here to make, parenthetically, the obvious comment that the lawyer who is not a citizen first and a lawyer afterwards is a mistake, and the public well enough knows it.

Bearing these facts in mind, we should expect to find that legal education makes no very strong appeal to the public. Having little admiration for lawyers in general, our average man has little interest in schools that train lawyers. That attitude is natural enough. Is it also permanent and necessary? That depends upon the character of the legal training afforded by the schools, the ideals and objectives that determine their development. I think a new epoch in legal education is already begun.

In explaining what this new epoch means, and what are its objectives and ideals, we must first consider the lawyer and his ways. Adapting the quaint conceit of the seventeenth century grammarians, we will consider first the lawyer his trade, second the lawyer his profession, and third the lawyer his vocation.

Let us define our terms, trade, profession, vocation. The tradesman prosecutes his trade for his own advantage. He endeavors to buy at a low price and sell at a high price so that the profit of the transaction may be with him, and not the other party. Such skill as he may acquire he turns to his own profit rather than to the service of his community. But the professional man holds himself out—professes—to be ready to render to the public service of a kind requiring very peculiar training and skill, such as is possible only to one possessed of unusual learning and marked intellectual powers. Originally the professional man, whether serving as an advocate in the courts or as physician to the sick, rendered his skilled service without agreement for compensation. He may have looked forward to the present,—or fee—which his grateful client or patient would probably give him, but he had no right to demand it. To the professional man the main consideration was the service rendered to his client, and through his client to the public. His personal reward was merely an incident. In thus serving the public through his client

he should not engage in any practices that would be injurious to the public. Hence the concept of professional ethics. The member of a profession guilty of unprofessional conduct, and unworthy of the public confidence, must be expelled.

Yet others are distressed to see the sorrows and misfortunes of their fellows. They see a vision of a happier world, the glory of a brighter day. Forgetful of self, without thought of reward, they feel called to devote their talents and their lives to the service of their fellowmen. The most obvious vocation is that of the teacher of religion in foreign lands, the missionary, but there are many others in the land in which self sacrifice is scarcely less real, even though it be less obvious.

Among the lawyers of our day there are many—far too many—to whom the law is but a trade. There are many to whom it is a profession as well. There are some—indeed a goodly company—to whom it also extends a call to unselfish and unrewarded service to the public; and we are glad to note that the number of lawyers to whom the law is a vocation as well as a profession, always considerable, is very materially increasing in our time.

There are many of the attorney's activities that do not rise above the level of a trade. The drawing of the papers involved in the ordinary small transaction, the writing of simple wills, the filing and releasing of liens, the collection of bills, much of the practice in petty courts, even the drawing of pleadings taken from the form book, these and hundreds of other details in the work of the attorney require no learning, very little skill, and very limited knowledge. Uriah Heep or any other of the graduates of Mr. Tidd's school of practice, could perform these services as well as Lord Eldon or Rufus Choate. Indeed the bar of almost any considerable community can show one or more uncultured and ignorant men whose native shrewdness and unscrupulous methods have built up a large trade in the mechanics of the law which bring to them much gain, to the public much loss and to the legal profession a sadly damaged reputation. It should be added, however, that many of these tradesmen in the law honorably perform useful functions in a community, comparable to those of a notary in continental Europe. I have even known such lawyers who had no understanding whatever of the law as a science, whose lack of culture was so marked as to make them uncouth, but who possessed such sterling character, such right hearts and such good sense as to make them benefactors of their communities.

But the trade lawyer, even though he be not a shyster or ambulance chaser, is seldom a public asset. He is usually a distinct liability. If the schools were to train only such lawyers—as I am afraid some schools have done—no man could decently ask for them support either from the state or from private benefactors. But the man to whom the law is a profession stands in a different place in the social economy. He renders an indispensable service to society. It is through his ministry at the bar, on the bench, in the legislative halls, that we have throughout this broad land of restless energy and feverish industry the reign of Law, that law of which Bishop Hooker wrote.

"Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage,—the very least as feeling her care, the greatest as not exempted from her power; both angels and men and creatures, of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

Just as our organized physical world is possible only because of the unseen but all-pervading force of gravitation, without which it would dissolve into a cloud of dust floating aimlessly in ethereal space, so our social order can exist only by reason of the unseen influence of law. Our national life had its beginning when the little company of Pilgrims, three centuries ago, gathered in the narrow cabin of the "Mayflower," drew up and ordained for their government the famous "compact." To those men was given the vision to see that the reign of law is the absolute condition of the existence of society and of the development of civilization itself. The law touches and controls every human relation and without it none of the arts or sciences can advance or even exist. The law protects the child before it is born; unseen it stands guard over the infant in its cradle. It attends every step of the growing child, seeks to surround him with healthful influences, both physical and moral, and provides for his education, and full opportunity to fit himself to take part according to his abilities in the great struggle of life. When he is come to manhood the law assures him equal participation, to the measure of his skill and his strength, in the God-given blessings of fruitful work, protects him from fear and violence so that he may concentrate his strength and his mind on that work, and safeguards him in the enjoyment of the fruits of his labor. It makes a castle of the

home that shelters his wife and children, and finally when life is done stands vigil over his long sleep in the churchyard. Yet throughout his long journey from the cradle to the grave he is, for the most part, if a law-abiding citizen in a well-governed country, as unconscious of the law's protecting care as he is of the ceaseless supporting pressure of the atmosphere. It is only when the law fails to perform its function that the citizen becomes acutely conscious of its existence. If his property is destroyed by rioters, if his life is endangered by robbers, or if other wrongs are inflicted upon him, he calls loudly upon the law for protection and redress. Then it is that the invisible power of the law gives visible evidence of its existence, in hurrying squads of policemen or of soldiers, or perchance in the solemn proceedings in the court room. The external signs of the majesty of the law, those agencies through which it reigns, are manifestly of great importance, just as are the fixed rules of law which determine the activities of such agencies, but they are not to be compared in ultimate significance with the spirit that exists unseen within this visible semblance. This is the meaning of Lord Coke's famous phrase, "Reason is the life of the law." A rule of law is not necessarily good; it may be positively bad. It is just as good or bad as the reason that lies behind it, and that reason is good only so far as it is consistent with the spirit of law. This term, immortalized by Montesquieu's famous treatise on "The Spirit of the Law," has proved too sublimated for American usage. Therefore the concept has been brought to earth, and renamed "social justice." Social justice is what society needs for its proper development, just as the growing child needs a healthful environment. Social justice is what all men desire and seek. But unhappily this search is like the quest of the Holy Grail. The vision of the searchers is obscured by self-interest, and too often that which is discovered and proclaimed as social justice is but such an arrangement as will best promote the interests of the individual or the group that proclaims it. Like the Holy Grail, social justice is to be discovered only by him whose heart is pure, and—one may add,—whose head is clear.

During the half century that is now closing the American law schools have slowly and painfully struggled upward from their insignificant status of trade schools, inadequately teaching rules of thumb as stated in textbooks, and the forms required for this or that, to fairly effective institutions for training men to serve worthily in a noble profession. It is seldom that such a remarkable trans-

formation is so definite in its beginning, or so clearly attributable to the vision and achievement of one man. Modern legal education began in 1870, when C. C. Langdell was made Dean of the Harvard Law School. The appointment itself was revolutionary. To induce the Harvard Board of Overseers to place a young lawyer from New York who had attained no distinction at the bar in the position held by such famous masters of the law as Story, Greenleaf and Parsons, was a task so difficult as to tax the skill and patience of Harvard's young president, Charles W. Eliot. The first action of young Langdell excited first amazement and then ridicule. Instead of telling his students what was the law by lectures, or giving them textbooks where they could find the rules of law as stated by the revered masters, like Coke, Blackstone, Kent, or Story, he put in their hands collections of cases taken from the law reports, and told them to discover the rules for themselves. It is not surprising that this method seemed absurd to lawyers at the bar and even to Langdell's own colleagues. How could untrained boys interpret cases so well as the experienced lawyers and judges who lectured or wrote books? And even if they could, would not the process prove so wasteful of time as to be impossible? But Langdell's students liked the new method, even though they were called "Langdell's Lambs" in derision. Langdell persisted. His new method grew rapidly in popularity. His colleagues began to understand the new idea. Here was the beginning of critical research in dealing with the law in the class room. Then the lawyers at the bar began to note that young men trained under Langdell were more capable assistants. Members of the Boston and New York bar began to seek out the high stand men among the graduating class. Then in 1874 Langdell, with Eliot's support, did another seemingly absurd thing. He brought into the faculty James Barr Ames, a young man just graduated, who had had no experience at the bar, had never been even admitted to practice. The revolutionary character of this action is better appreciated if we recall that at this time most of the law teachers of the country were distinguished lawyers in practice or judges on the bench, who taught the students incidentally what they knew. But Langdell's judgment was sound. Young Ames was a genius. To him, more even than to Langdell, we owe our modern system of legal education. With the aid of Ames, the Harvard Law School grew rapidly in popularity, numbers and influence. By the close of the century the victory was won. With very few exceptions the leading schools of

the country had accepted the so-called case system of instruction. At the present time it may be regarded as fully established. I suppose there are still some schools which adhere to the textbook and the lecture as principal vehicles of instruction, just as there are still some people who prefer a horse-drawn carriage to an automobile. But they too must yield to the inexorable logic of results.

But the so-called case system, which, perhaps, might more aptly be called the system of applying the scientific method of research to the study of law, has produced other results than securing for high stand graduates positions in great law firms at what seem to us older lawyers absurdly high salaries. It has necessitated the development of the professional teacher of law as distinguished from the teaching practitioner or judge of the last century. The teacher who sits before a class of well trained and capable young men who have access not only to the cases in their casebook, but also to the whole body of case law in the school library, including the most recent reports, the textbooks and the law journals, faces quite an ordeal. If he undertakes to lead the discussion of an assigned case without a fairly wide knowledge of the cases and periodical literature relating to the same subject matter, and a well thought out theory on which cases are to be reconciled and distinguished, he courts confusion and defeat inside the class room, and loss of professional reputation outside of it. If he contributes nothing by way of textbooks or magazine articles in the effort to solve the innumerable problems that arise in every course that he teaches, he subjects himself to the danger of being thought to have nothing in him, since nothing comes out. On the otherhand, if he is unwise enough to publish a book or essays that show him lacking in knowledge, in understanding, in scientific method, or in judgment, he merely advertises his unfitness for the position he holds.

The operation of such facts tends to set up a selective process which slowly, but none the less certainly, eliminates from the teaching branch of the profession the stupid, the lazy, the ignorant, and those of unbalanced judgment, and effects the promotion of the abler and more scholarly of those who undertake to teach the law. This condition of affairs requires that successful law teachers shall possess very much the same qualifications that make for success at the bar. But the financial rewards of marked success at the bar are so much greater than those of even the most distinguished success in the class room that it is, in most instances, impossible to draw the

mature man who has achieved distinction in the profession from the bar to the professor's chair. Hence has arisen the saying, now become almost an axiom in law school administration, that "if you wish to secure law teachers of first-rate ability, you must catch them young." This accounts for the practice, now steadily increasing, but still horrifying to many excellent lawyers, and sometimes to the controlling Boards of Universities, of calling as instructors in law young men just graduated in law, who have had no experience in practice whatsoever. Lack of court room experience is unquestionably a serious handicap to a young teacher; but experience has clearly demonstrated that it is safer to experiment with inexperienced ability than experienced mediocrity.

The working together of all these conditions and tendencies has produced many interesting results that have become clearly manifest within the last decade. First, as already indicated, is the development of a new branch of the legal profession, the professional law teachers, who devote their entire time and energy to the work of the class room and its incidents—for the very simple reason that they cannot do less and survive. The part time teacher who quizzes or lectures to a class after a busy day in the office or court room, has served a useful function in his day, but he does not teach in the sense in which that word is now used in the standard law schools of the country. Second is the recognition by the profession, and even by the public, that there have been developed in the teaching branch of the profession some men of exceptional ability. The recent appointment of Dean Stone, of the Columbia University Law Faculty, as Attorney General, and his later elevation to the Federal Supreme Court, have been recognized both by lawyers and laymen as wise and fitting.

When in 1892, at the instance of the American Bar Association, the governments of the several states established the Conference of Commissioners on Uniform State laws, it occurred to no one that the work of drafting the uniform acts to be recommended to the states should be entrusted to the law teachers of the country. Later Professor Williston and Dean Ames were called in, and most of the acts that have gone from this interesting body of public servants to the state legislatures have been drawn by members of the faculties of our leading law schools. When some three years ago the American Institute of Law was formed and endowed for the purpose of undertaking the arduous task of restating in clear and precise terms

the principal topics of our law, its membership was extended to and gladly accepted by nearly a thousand of the most distinguished members of the Bench and Bar of the United States. These men, through their executive council, over which ex-Attorney General Wickersham presides, selected Professor William Draper Lewis, of the University of Pennsylvania, as Director of its activities, and entrusted the preparation of the first draft of the statements now undertaken, to some 26 teachers of law drawn from eleven different universities. It would be tiresome to extend further the statement of the evidence that shows the rapidly growing public recognition of the ability and usefulness of teachers of law.

A third result of putting legal education on the basis of scientific research, naturally follows from the fact that the law faculties now require men of unusual ability. Salaries of law teachers have rapidly been elevated, so as now, on a sort of rough average, to be on the same level as those of the judges of the highest courts of the several states. The salary differential usually obtaining in favor of professors of law naturally arouses the persistent protests of their academic brethren, but economic facts are just as stubborn as facts of other kinds. They cannot be ignored.

A fourth result of the new system is seen in the great crowds of students that now flock into the leading law schools of the country. Not more than a quarter century ago there were many to argue that training for the bar could much better be gotten in the law office than in the law school. Incidentally we may remark that they were quite right in so far as that training was for the law as a trade. At that time the problem was how to induce young men preparing for the bar to attend the law schools. Now the problem in many of our law schools is how fairly and wisely to limit the number admitted so as not to over tax existing facilities. More striking still is the recently adopted program of the American Bar Association to require law school training as a prerequisite for admission to the bar.

A still further consequence of the growing prestige of the law schools is well illustrated in this splendid new building that the State of North Carolina today formally dedicates to the use of the Law Faculty of its great university. Throughout the country facilities provided for the work of the law schools tend to keep pace with the growing efficiency and usefulness of the schools. At the University of Michigan there is now under construction a group of buildings that will provide the most complete and extensive equipment ever

devoted to the uses of legal education at any time or in any place. In other universities plans scarcely less ambitious are being laid.

Are we to conclude, then, from this rather self-gratulatory survey, that the long, hard struggle to establish a scientific and efficient system of legal education has been won at last, and that we may now relax our efforts and rest from our toil? Not at all. Through these struggling years of development, the American Law School has come to its day of greatest opportunity, and, perhaps, of greatest responsibility. As a trade school in the earlier days, teaching the mechanics of the law, droning out so many rules with exceptions, like dead things with holes in them, it was impotent and insignificant, as rightly it should have been. As the later professional school, training students to regard the great body of the law as a living, growing, changing organism, which was soundly administered only when adjusted to the social and economic needs of the people whose conduct is governed by it, the law school has become strong and influential. But in the field where the lawyer is called to render to the public unremunerated service, the law school has as yet done almost nothing. Many distinguished members of the bar, in former generations as well as our own, have responded nobly to the vocation to render the law better suited to the needs of their time. They have served in constitutional conventions, on legislative committees and commissions, taken part in conferences, drafted codes, worked in bar associations, receiving little or no compensation, and no very great public appreciation; but in this work they have received very little aid from the law schools, though occasional contributions by individual professors have already been mentioned.

As recently stated in a public address by former Attorney General Wickersham, "No law school can now remain content with being a mere training school for attorneys." That is a worthy and necessary function, for the institution that trains young men for honorable and efficient service at the bar and on the bench renders a great service to the state. But the law school of the future must go much farther in the field of needed service. The law as we study it in our class rooms is indeed a wonderful system that rightly commands the admiration of all who have the knowledge and intelligence to comprehend it. It may truly be said to have been distilled from the experience of our race through a thousand years. Yet one need not be a lawyer to know that there are many defects and imperfections in this great system which not infrequently work injustice and oppres-

sion, and produce wasteful and irritating delays in legal proceedings, in spite of the best efforts of able and conscientious judges. But one does need to be a lawyer, and a good lawyer, to appreciate the fact that any hasty attempts to repair these defects by legislative action or by ill-considered departure from judicial precedent are apt to introduce still greater confusion, and delay, and do more harm than good. This fact explains the instinctive dislike which the sound lawyer feels for the brash reformer and the ignorant scorner of ancient ways.

The man who would undertake to remodel or even repair our complex system of law, should understand it with a thoroughness such as has come to few men in our time or any other. This understanding should be not merely of the wilderness of ancient laws and modern instances. He must learn to know the vital spirit of the living law. He must know the origin of its rules, and trace the history of their development through the changing centuries. He must see them on the background of social and economic conditions that gave them origin and shaped their changing forms; and above all else he must understand the industrial, economic and social conditions of our own time, so changed as they are by the quickening of the means of transportation, the lightning like speed of communication, the vast growth of the press as a means of disseminating intelligence, and all the diversified wonders of modern scientific achievement. These have produced a new social order, involving a degree of mutual interdependence and necessary coöperation, and conditions of organization and combination in industrial and commercial effort, such as our race has never known before. Yet this steam driven, lightning led, air piercing age must be regulated in its social conduct by a system of law that had its origin and much of its development in pastoral England when 20 miles was a day's journey and to the average Englishman the residents of the next village ten miles distant were as unknown as dwellers across the sea. Naturally such of our rules as are not suited to the needs of our times do not work well, causing confusion, waste, dissatisfaction, sometimes even disorder. The remoulding process must be unceasing. But it is a hazardous process, and must be done with a skilled hand.

To such a broader knowledge and understanding of the law as the regulating instrument of our frenzied civilization, which we call jurisprudence, the law school of the future must contribute its part. It is quite true that our law schools have not as yet the man-power

or the equipment to enter strongly into this vaster and more hazardous field of high endeavor. But the call to the universities of this broad land is clear and compelling. They must find strong men for this task, and develop in them the knowledge and understanding required to accomplish it. These must link arms with their brethren in History, Economics, Political Science and Sociology, and with them move forward to that goal of highest public service to which every university worthy of the name aspires. "The University," says that distinguished lawyer and scholar, Justice Oliver Wendell Holmes, of the Supreme Court of the United States, "is a place from which men start for the Eternal City. In the University are pictured the ideals which abide in the City of God. Many roads lead to that haven, and those who are here have traveled by different paths toward the goal. . . . My way has been by the ocean of the law. On that I have learned a part of the great lesson, the lesson not of law, but of life."

I know that this ancient and honorable seat of learning will not fail to answer the call to this high service.

GREETINGS FROM THE SUPREME COURT

WILLIAM A. HOKE

CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT

I know that I express your cordial sentiment in saying how highly we appreciate the entertaining and impressive address of our distinguished visitor, Dr. Vance, and in assuring him that we are grateful for his coming and are helped by his message. We are glad to be present at these dedicatory exercises, and that we attend in such a goodly company. In common with all the people of the State, we take just pride in this Law School, and know of a certainty that it well deserves the confidence that we have in it.

Year by year, or rather twice in every year, it sends down its classes of young men to apply for license to practice law in the courts of the State, and they give every indication not only of being well instructed in the learning of the law, but of having also a fine concept of professional ethics, and a high standard of civic duty and conduct. No man who has opportunity as we have to see and observe them can fail to realize that they will assuredly add to the strength and well being of the commonwealth, and that they will range themselves with the forces that make for righteousness and peace and well ordered progress.

To my mind, there is no reason why you should not have as fine a law school as there is in this or any other country. You have the material, you have the organization and competent leadership.

You have the setting and background of a great University with its history and achievement, its association and its culture, of which you are a part. Moreover, you have the inspiration and the purpose, and are moving in the right direction, and I verily believe you will attain to what is highest and best in such a school. Indeed, in a great many respects, you have already arrived.

I heartily congratulate you gentlemen of the Law School, on the record you are making, and on having such a beautiful and commodious building in which to do your work. In every way it is worthy of the school and of the great teacher and lawyer and citizen in whose honor it is named.

I take the liberty also of congratulating our legislators, whose liberality has made all this possible, that our State is already reaping such rich returns from their encouragement and enlightened statesmanship.

I congratulate you Mr. President, you and your associates and the trustees of the institution, for the splendid way in which you are carrying on, showing as it does both good judgment and far seeing vision. We rejoice indeed, fellow citizens, for the work our University is doing for the good of our State and its people, and I am grateful for the opportunity to say this in your presence.

GREETINGS FROM THE NORTH CAROLINA BAR ASSOCIATION

G. VERNON COWPER

PRESIDENT OF THE NORTH CAROLINA BAR ASSOCIATION

I can not refrain from saying, "It is good to be here." There is something altogether inspiring in this atmosphere. To the University student of twenty years ago, the campus presents a rather complex mixture of the old and the new. From the South Building looking directly north, the scene is familiar enough, but from the same point, going in any other direction, especially southward, he might well call for information and a guide. For all that he sees, however, certainly he is devoutly thankful.

Let me, however, turn, more particularly, to the occasion which brings us together. The erection of a commodious and spacious building to be set apart for the Law School is a matter of significance, not only to the University, but in a very real sense to every member of the bar of this commonwealth. If we could think of this building in material terms alone, there would be genuine satisfaction in its perfect lines and architectural beauty. But, if I sense the aspirations and hopes of those who dedicate this structure today, they have a deeper purpose, of which the mere mass of brick and mortar is but the outward and visible expression.

Every lawyer who has seriously considered the problems arising in the administration of justice in the State has, I fancy, arrived at the conclusion that the hour has come when we must require of those who minister in our courts a broader preparation for the important and delicate responsibilities which devolve upon them. In no sense

can this be construed in detraction of the great law teachers who, under the difficulties of the past, have wrought so faithfully and well. Too high a tribute cannot be paid them. One of the happy incidents of these exercises is that they will help to perpetuate the name of one of the outstanding representatives of those noble preceptors.

There was a time when it would have been rather harsh, if not positively unjust, to have demanded of the entrants of our law schools the equivalent of at least two or more years of collegiate education. Happily, that time has passed in North Carolina. At present, the doors of this University and of our other colleges swing wide open, and whosoever wills may enter. The day has also dawned when the study of law should no longer be crowded in one or even two years. Rather, the student who applies for license to direct the most complex and sacred relations of life should fully familiarize himself with the fundamental principles of law and procedure, as well as their past history and present application. More than this, he should be deeply grounded in the ethics of the profession and the high responsibilities of the lawyer as an officer of the court.

It is because I am persuaded that a true interpretation of this occasion has some such object as I have imperfectly outlined, that I am happy to be present and bring you a word of encouragement and congratulation from the corporate body of the Bar of North Carolina.

RESPONSE FROM THE LAW SCHOOL

MERTON LEROY FERSON

DEAN OF THE LAW SCHOOL OF THE UNIVERSITY OF NORTH CAROLINA

It is an honor to participate in the administration of a law school which has for 80 years been a vital influence in the life of this great State. It is a pleasure to be associated with a faculty and student body that in past achievement and present promise stand among the foremost. It is a responsibility which was assumed with some misgivings but is being carried with increasing confidence as day after day I sense the helpful support of our alumni and the coöperation of the citizens throughout the State.

The Law School in so far as we can see it today consists of our beautiful Manning Hall, a library and a corps of teachers and students. It has other assets, however, more difficult to display—for indeed they are intangible. It is these other and intangible assets that give life and character to our School. The trend, ideals and morale of the institution, as a going concern, constitute its true character and its true worth. These qualities do not inhere in bricks or books and only to a limited degree in present personnel. The School as a living institution gets its momentum, goal, and power from the splendid men who have taught and studied here during the past eighty years.

It is hard to prove the efficiency or the products of a school. The products of a factory may be expressed in dollars but the products of a school cannot be expressed in any measurable units. One fact though is clear. This School has made an important—if not a measurable—contribution to the life of the State. A large per cent of the very able Bar in North Carolina attended this Law School. The same is true of those who have manned our Supreme Court and made it one of the most notable among the courts of the various states. All the Justices, save one, now on our Supreme Court attended this School. That one was prevented from attending here; but his coöperation and example in all that pertains to legal scholarship reveals a kindred spirit. The School has been a great influence for good in the history of the State.

These men who studied here and such teachers as Manning, Battle, McRae, McGehee and McIntosh have given the institution its character and kept it abreast in the steady advance of legal education.

The School had its beginning at a time when standards of legal education were almost unknown in North Carolina or elsewhere. During the life of the School standards have been established and gradually raised throughout the country. The men who conducted our School in the past kept it abreast with the progress of legal education in their day. They would expect us to fall in with the trend of our time. Our task at this moment is made somewhat easier by the great national movement now under way to bring up the character of the legal profession and make it worthy of the great work it has to do. The Bar of the United States has indulged in a candid introspection and discovered a great deal of room for improving itself. The personnel of our profession, past and present, includes many of the best characters in history, but it also includes a great many who are no credit to our profession and would be no credit to any profession or occupation. This is a situation that cannot be corrected over night. The members of the American Bar Association have perceived that a gradual improvement may be brought about by providing more adequate education and more stringent requirements for admission. A committee of the best lawyers in the country have worked out a clean-cut program for such schools as will undertake to give this more adequate training a young man needs before coming to the Bar. Without reciting the details of that plan, which details are entirely reasonable—I am glad to say that the North Carolina University Law School complies with all of them and expects to take her place as a class "A" school. This gives us a clean-cut program. We accept it not merely because it is clean-cut, not merely because it is nationally fashionable, but because it is a program of service. This Law School is not maintained as an end in itself. It is an institution for service to the State and to its students. A law school failing to render such service has no excuse for its existence. What then, let us ask, does our duty to the State dictate? Surely there is no service to the State in merely turning out more lawyers. We have enough, and some to spare. There is, however, a real service to the State in turning out more able lawyers —lawyers who elevate the standards of the profession by being in it, whose services will be a potent influence in securing justice, promotting commercial intercourse, and elevating our political life. The young men of North Carolina who come here as law students are potentially lawyers of this higher type. They have natural ability exceeded by none. I say that thoughtfully and with considerable

basis for the comparison. These young men should have the most thorough instruction we are able to give. They should be held to standards at least as high as those recommended by the American Bar Association. When that has been done the Law School will have rendered true service to the State.

It happens that our duty to the individual student exactly coincides with our duty to the State. The young man who comes to us has turned to law for his life work. He hopes to succeed. He wants to be happy in his work, prosperous and useful. He has turned away from a hundred other occupations that he might have followed. What does the best interest of that individual man require from us? The answer is clear. It may be read in the faces at the Bar in every county seat. You can read in those faces some stories of glowing success and some of dismal failure You can see on one hand men who came to the Bar with abounding hope and confidence; but who, as the years rolled by have been found wanting. They have become triflers and hangers-on. Their hope is fading. Their youth has gone. They may have assumed the duty of supporting a family. It is everlastingly too late for those men to enter and put their youthful, untrammeled enthusiasm into another occupation for which they were better adapted and prepared. You will see on the other hand men who have found in the legal profession a work of absorbing delight. They are trusted, honored and well paid.

The law student is on a road that may lead to either one of these extremes. The race is swift and the stake is large. If he lacks the taste, the ability or the energy to hold the pace and succeed, the sooner he finds it out the better it is for him. There is no kindness to anyone in coddling and coaching an unfit man into the profession. Our duty to the individual student requires thorough teaching and standards he cannot pass if he be lacking in the ability, energy or education that a real lawyer should have.

Schools and Bar examiners have a great responsibility to young men entering the profession. There is a catchy argument afloat, that schools and Bar examiners may as well coöperate in providing easy admission to the Bar and thus "give every boy a chance" for—the argument runs—if the boy is unfit he will finally be eliminated anyway by the competition he meets. Now if this argument be taken seriously, it should be realized that such a prolonged elimination process is unfair to the public and a cruel injustice to the man thus

eliminated. By the time this unfortunate boy is eliminated he will be of middle age, his spirit broken, and a life that might have been useful will be ruined.

The fitness of a man to succeed in practice is not necessarily established by his graduation from a good school. He may still lack the essential personality and character. But his unfitness to become a real lawyer will in most cases be established if he is unable to thus graduate.

We have at hand the makings of a great law school. It has a good history. The State abounds in young men of good stock and outstanding ability. It must be our care to maintain the School on such a plane that it will continue to be a credit to this great State.

PRESENTATION OF THE BUILDING

J. ELMER LONG

LIEUTENANT-GOVERNOR OF NORTH CAROLINA

I stand here representing the State of North Carolina, which is a little unusual as I usually represent the defendant. I bring with me the regrets of His Excellency, the Honorable A. W. McLean, that he cannot be here.

The State of North Carolina is the people of the State of North Carolina. The people of North Carolina are interested in this Law School. The people of North Carolina are not so much interested in the building. The people of North Carolina are very proud that it has been named the Manning Law Building. There is no name in North Carolina that stands higher with men who knew him than the name of Manning. The people of North Carolina are not so much interested in the teachers of that Law School, but the people of North Carolina are interested in what comes out of that Law School.

I trust that the dedication of the Law School will bring what the people want—the development of young men who are to be the lawyers of North Carolina; first, as men of moral character; second, men who know legal ethics; third, men who have the interest of their fellowmen at heart; and, fourth, men who have developed minds.

I present this building to the University and I desire to say to you, if I may, that it is expected that this University and that this Law School will develop men of the finest character and type possible, because we have in North Carolina the best material on earth.

ACCEPTANCE FOR THE UNIVERSITY

HONORABLE JOSEPHUS DANIELS

Today is marked in this dedication by two things that stand out clearly:

1. The name of an honored North Carolina jurist is commemorated in a way alike fitting to John Manning's spirit and worthy of the institution blessed by his long and inspiring instruction. It was said of Dr. Manning, as of Lord Thurlow, that he looked wiser than it was possible for any man to be. Certainly he possessed a dignity of bearing that was in keeping with the loftiness of his life. He had a wisdom beyond any law instructor of his period, a dignity worthy of his character and a noble life free from pretense or guile. His sterling integrity, his transparent honesty and honor shone with steady rays. Every student was the better and the wiser for the privilege of association with Dr. Manning. May his lofty character and incarnation of justice be perpetuated in the building that bears his name!

2. The second significant thing of the day, let us trust, will be to place stronger emphasis upon the position of the lawyer in the life of the commonwealth. In a State where lawyers have the chief part in making the laws, in interpreting the laws and in executing the laws, there is need of a new appreciation of the place the lawyers occupy in the official life of the State.

I sometimes fear that there are lawyers who forget that an attorney is "an officer of the court." As such, it is their highest obligation to make their paramount duty the upholding of justice. They owe a duty to their clients, but such obligation is second to the duty they owe in making the courts the agency of equal and exact justice.

We hear many and earnest admonitions to jurors to be true to their oaths. Only once have I heard from the bench an admonition to lawyers to remember they are officers of the court, part and parcel of the agencies created for the enforcement of law.

May I not suggest that the lawyers to be trained here will be impressed with the fact that securing a verdict of acquittal for a client is never to be accounted as equal to the obligation to secure justice. If laws are not well enforced, if criminals escape punishment, if people lose a measure of respect for the courts when there are miscarriages of justice—if these things must be remedied, there is but one way—that is, to send trained men into the legal profession who are guided by the ethics which will insure perfect respect of tribunals responsible for the protection of life and property. That is the goal sought for, and for this advancement, this Temple of Justice has been erected. It is in the faith that here it will be true, that

"For justice, all seasons Summer, and every place a temple."

I am privileged on behalf of the trustees to present to you, Mr. President, the Manning Building for dedication to the teaching of law and the inculcation of love of justice.

The
North Carolina Law Review

Volume Three | April, 1925 | Volume Two

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Published in February, April, June and December, for The School of Law, by the University of North Carolina, Chapel Hill
The University of North Carolina Press

NOTES AND COMMENTS

AN AGENCY THEORY OF MECHANICS LIENS—In a recent North Carolina case,[1] a husband entered into a contract with his wife to build a theater on her own land. The wife paid the husband the full amount in advance. The plaintiff furnished materials to the husband for the building of the theater and brought suit to subject the wife's land to a lien for the amount due from the husband for the materials furnished.

If a lien for labor done and for materials furnished is to exist against an owner of land, it is clear that the lien claimant must conform to the provisions of the statute of the state where the land is.

"There is a great diversity of provisions in the statutes. . . . No two states are alike. . . . There are to be found in them several distinct plans or theories. Yet, as substantially the same

[1] *Rose* v. *Davis* (1924) 188 N. C. 355; 124 S. E. 576.

end is sought in all of them and substantially the same constitutional and legal limitations apply everywhere, the statutes agree in substance in their more important features, though these may be stated differently."[2]

Ordinarily, a mechanic's lien is said to attach when the owner (1) contracts with a contractor to build on or to improve his land, or (2) consents to the contractor's making such improvements.[3] When materials or labor are furnished to the principal contractor, the person furnishing them is generally regarded by the statutes as a sub-contractor[4] and the principal contractor as the agent of the owner for the purpose of establishing privity between the owner and the sub-contractor. The lien being a creature of the statute and not of contract,[5] furnishing materials to the principal contratcor is in effect furnishing them to the agent of the owner and is sufficient to establish a privity for the purpose of the lien.

It is well settled in North Carolina that the basis for a mechanic's lien is the relation of creditor and debtor between the owner and the person furnishing labor or materials.[6] When this relation is established then the claimant may have a lien for the amount of the debt. Judge Allen delivering the opinion of the North Carolina Court said: "The lien for labor done and materials furnished is given by statute to enforce the payment of a debt and the general principle underlying the lien laws is that the relation of debtor and creditor must exist and that there can be no lien without a debt."[7]

At this point, it may be well to consider in a general way what gives rise to the relation of creditor and debtor between the owner and the material man. Where the principal contractor has (1) a contract with the owner to improve his land, or (2) where the owner has consented to such improvements, and, in either case, a material man furnishes materials to the principal contractor, upon the latter's default in paying for the materials, the material-man "is substituted to the rights of the contractor" to the extent of his claim.[8]

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[2] Jones, *Liens,* Vol. II, par. 1186.

[3] *Brick Co.* v. *Pulley* (1915) 168 N. C. 371, 84 S. E. 357.

[4] C. S., sec. 2437.

[5] *Beach* v. *Huntsman* (1908) 42 Ind. App. 205, 85 N. E. 523.

[6] *Boone* v. *Chalfield* (1895) 118 N. C. 916, 24 S. E. 730; *Weathers* v. *Borders* (1899) 124 N. C. 610, 32 S. E. 881; *Foundry Co.* v. *Aluminum Co.* (1916) 172 N. C. 704, 90 S. E. 923.

[7] 172 N. C. 704, 705.

[8] *Brick Co.* v. *Pulley* (1915) 168 N. C. 371, 375, 84 S. E. 357.

It is clear that the lien does not attach by reason of the owner's contract or consent to the imposition of the lien. It seems that the essence of an arrangement between an owner and a contractor for building or making repairs on his land is that the contractor is obliged, or intended, to deal with sub-contractors in doing the work and securing materials. Therefore it seems to be correct to say that the principal contractor is the agent of the owner for the purpose of creating valid debts to which the various mechanics' lien laws attach liens. As long as there is a principal-agent relationship between the owner and the contractor, then the contractor may, by dealing with a subcontractor for work or materials, create a debtor-creditor relation between owner and subcontractor, and hence a lien may arise. This is true although the owner may prohibit dealings with a particular subcontractor or may limit the scope of the contractor's authority.[9] What the cases mean to say is not that the owner, by contract or consent to the imposition of the lien, is liable to the lien, but that by contract or consent creates an agency, and the agent may, under certain circumstances as to notice and other statutory requisites, and acting within the apparent scope of his authority, create a debt, and thus enable the subcontractor to impose a lien on the principal's property.

"The right to a lien is confined to work, labor and materials required by the principal contractor. To that extent, by force of the statute, the owner makes the principal contractor his agent to bind his property, but no further."[10] "The statute itself has established a direct contractual relation between the material man and the owner; so that furnishing materials to the contractor is in effect furnishing them to the owner . . . since the principal contractor is agent of the owner for the purpose of the statute."[11]

In the ordinary case, where the owner and contractor are both *sui juris*, if a contractor has an express or implied contract with the owner of property to improve or build on it, a subcontractor may, by working for or furnishing materials to the contractor, subject the owner's property to a lien for his claim. This is only in the event that the principal contractor has failed to pay for such services or materials, and, in addition, the subcontractor has furnished the

[9] This is similar to the agency cases where private instructions are given to an agent, which are held not to be binding on third parties without notice.

[10] *Siebrecht* v. *Hogan* (1898) 99 Wis. 437, 75 N. W. 71, 73.

[11] *Osborn* v. *Logus* (1895) 28 Ore. 302, 42 Pac. 997, 1001.

owner with proper statutory notice of his claim.[12] The object of the statute is to provide a ready and available means whereby persons furnishing labor or materials may have adequate security.[13] Furnishing materials to the contractor is, in effect, furnishing them to the owner through a duly authorized agent. This gives rise to a debt against the owner in favor of the subcontractor, which, in turn, forms the basis for a lien.

Mere knowledge that work is being done or materials furnished on one's property does not enable the person furnishing the labor or materials to obtain a lien, since there is no privity between the owner and the person furnishing the labor or materials. If, in such a case, a material man furnishes materials to a contractor, and the contractor fails to pay for them, the owner's property may not be subjected to a lien therefor.[14] Since the material man is said to be substituted to the rights of the contractor to the extent of his claim, he is in no better position than the contractor, who is not acting in any representative capacity for the owner of the land. There is no valid debt against the owner in favor of the material-man, upon which a statutory lien may be based, although there may be a quasi-contractual action for the reasonable value of the improvements on the owner's land.

When the owner of land is a married woman, further considerations are presented. Formerly, a married woman could not be bound by any contract affecting her real or personal estate, unless it was executed in the manner prescribed by law. The requirements for such a contract, with certain exceptions, were the written consent of the husband and privy examination of the wife. If these formalities were lacking, the contract, as affecting her estate, was invalid.[15] Consequently there was no valid debt upon which a lien could be based. The Court in numerous cases emphasized the language of the lien statute, which provides for a "lien for the payment of all debts *contracted* for work done or materials furnished."[16] Since the married woman was incapable of contracting in such cases,

[12] *Brick Co.* v. *Pulley* (1915) 168 N. C. 371, 84 S. E. 357; *Porter* v. *Long* (1924) 187 N. C. 629, 122 S. E. 483; *Clark* v. *Edwards* (1896) 119 N. C. 115, 25 S. E. 794.

[13] *Grissom* v. *Pickett* (1886) 98 N. C. 54, 3 S. E. 921.

[14] *Weir* v. *Page* (1891) 109 N. C. 220, 13 S. E. 773; *Nicholson* v. *Nichols* (1894) 115 N. C. 200, 20 S. E. 294.

[15] *Flaum* v. *Wallace* (1889) 103 N. C. 296, 9 S. E. 567; *Farthing* v. *Shields* (1890) 106 N. C. 289, 10 S. E. 998; *Loan Assn.* v. *Black* (1896) 119 N. C. 323, 24 S. E. 481; *Ball* v. *Paquin* (1905) 140 N. C. 83, 52 S. E. 410.

[16] C. S., sec. 2433.

there could be no debt to support a lien. In *Farthing* v. *Shields,*[17] the court held that the power of a married woman to charge her real estate is measured by her power to dispose of the same; hence, if she had expressly charged the debt on her lands with the written assent of her husband, it would be of no avail without her privy examination. A thorough discussion of this may be found in *Ball* v. *Paquin*[18] and in the cases there cited by Judge Connor.

The law was changed, and these cases were overruled, by the adoption of a statute in 1901, providing that the section in regard to mechanics and material mens' liens, ". . . applies to the property of a married woman when it appears that such building was built or repaired on her land with her consent or procurement. In such case she shall be deemed to have *contracted* for such improvements."[19] This new section was held to be constitutional in *Finger* v. *Hunter,*[20] thus making it possible to charge a married woman's property with a lien for labor or materials furnished for improvements to her real estate without any of the formalities previously required. The law was further changed by the Martin Act[21] in 1911, which conferred upon married women a complete capacity to contract with third persons. Since then, she is as free to deal with third persons for improvements to her land, as if she were unmarried. Further, it is no longer necessary for a husband to join with his wife in contracting for such improvements. The fact that the owner of land is a married woman does not make any difference, when she is dealing with third parties, as far as the imposition of mechanics' or material mens' liens is concerned.

In order for a husband to subject the separate property of his wife to a lien for improvements placed thereon by him, there must be a contract executed according to the formalities of section 2515 of the Consolidated Statutes. This section provides that, "No contract between a husband and wife made during coverture shall be valid to affect or charge any part of the real estate of the wife. . . . unless such contract is in writing and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband . . . it shall appear to the satisfaction of such officer that the wife freely executed

[17] *Farthing* v. *Shields* (1890) 106 N. C. 289, 10 S. E. 998.
[18] *Ball* v. *Paquin* (1905) 140 N. C. 83, 52 S. E. 410.
[19] C. S., sec. 2434.
[20] *Finger* v. *Hunter* (1902) 130 N. C. 529, 41 S. E. 890.
[21] C. S., sec. 2507.

such contract. . . ." While the Martin Act and section 2434 of the Consolidated Statutes abrogated the above formalities in the cases when a married woman contracts with persons other than her husband, they did not change the law with respect to the requirements of section 2515, above quoted, in the case where a married woman contracts with her husband for improvements to her separate property, and the husband seeks a lien for himself.

In *Kearney* v. *Vann*,[22] a husband built on his wife's land under a contract with her, in which the requirement as to privy examination of the wife, according to section 2515, was omitted. The husband, having furnished materials, was attempting to secure a lien on the wife's land for the amount due on the materials. The wife had given the husband a note for $700.00 in payment of work and materials furnished which had not been paid. It was held that the property of the wife is not liable or subject to a lien for the husband's claim. Section 2434, above quoted, was held not to apply to contracts between husband and wife. The requirements of section 2515 had not been complied with. Thus the labor and materials furnished to the separate property of the wife by her husband were presumed to be a gift.

From the above reasoning, it would seem to follow that the husband might obtain a lien on his wife's land in the situation where the wife has contracted with a third party for the improvement of her land, and such third party has secured materials or labor from the husband. The husband, as a subcontractor, would be in a better position than the husband, as a principal contractor. Although no case involving these identical facts has been found, it would seem that section 2515 of the Consolidated Statutes applies only to contracts entered into directly between husband and wife, and that the husband, as a subcontractor, is entitled to a lien under the provisions of the lien statutes.

If the husband contracts with the wife to repair or build on her land, and a third person furnishes labor or materials, may such a subcontractor have a lien on the wife's land in case the husband fails to pay for the labor or materials? It is clear that the husband is not able to subject the separate property of his wife to a lien in his own favor by furnishing labor or materials to improve her property, unless a contract is executed by the wife in strict compliance with the terms of section 2515.[23] What is the effect of this

[22] *Kearney* v. *Vann* (1911) 154 N. C. 311, 70 S. E. 747

[23] See preceeding note.

section when a third party is seeking to subject the wife's land to a lien by reason of having furnished labor or materials to the husband, who has contracted with his wife to improve her land? In other words, is a formal contract between husband and wife necessary where a third party and not the husband is seeking to impose a lien?

Looking at the statutes and the cases in North Carolina, the conclusion seems to be that section 2515 has nothing to do with the case where a third party is seeking to impose a lien on the wife's land, but embraces only contracts between husband and wife.[24] As already discussed, no formal contract is necessary between a land owner and contractor, to make improvements on the land, in order that a subcontractor may get a lien. The essential thing is that the land owner and contractor be in a principal-agent relation.

The reason why the subcontractor is put in a better position than the husband, in the above instance, is due to the fact that the wife may consent or procure improvements on her property through her husband with or without a formal contract. By section 2434 of the Consolidated Statutes, the general lien law applies to the property of married women, whenever a wife consents to or procures improvements on her land and "in such case, she shall be deemed to have contracted for such improvements." Thus by the very words of the statute, a contractual relationship between the married woman and the subcontractor is established. This gives rise to a valid debt in favor of the subcontractor upon which his lien may attach. What actually happens is that by the consent or procurement of the wife, the husband is given power, as her agent, to improve her property by dealing with third persons for work and materials. No formal contract is needed to establish such an agency, the wife's consent being sufficient. The lien for labor or materials is thus imposed by reason of her consent to this agency of her husband. Consequently, the relation of debtor and creditor between the wife and the subcontractor is established through the husband's acts as agent of the wife. Consent of the wife to the imposition of the lien is not material. Neither is it essential that she consent to the particular improvement or to any particular subcontractor. Her consent is to the acts of her husband, as her agent, and those acts may lead to the imposition of a lien on her property by force of the general lien statutes.

[24] *Payne* v. *Flack* (1910) 152 N. C. 600, 68 S. E. 16; *Rose* v. *Davis* (1924) 188 N. C. 355, 124 S. E. 576; C. S., secs. 2433, 2434.

In *Payne* v. *Flack*,[25] the wife contracted with her husband for repairs on her land, and he secured materials from the plaintiff, who was seeking to enforce a lien. It appeared that the wife had paid the husband in full for the repair work, before the plaintiff gave notice of his claim, as required by statute. The court held that the wife's land was not subject to this lien, Clark, C. J., saying,

"This is not a case of a married woman standing silent when improvements are being placed on her house, receiving benefits, and then defying the contractor because she had made no valid express contract. In such case, the statute now makes her property subject to lien, upon the implied contract arising upon her conduct, as it would in regard to any one else under the same circumstances. But here she paid the contractor in full before receiving notice from the subcontractors, the material men, and is freed from liability to them as any one else would be under the same state of facts."

In *Rose* v. *Davis*,[26] the facts of which were stated at the beginning of this note and which are similar to those in *Payne* v. *Flack*, it was also held that the wife's land was not subject to a lien in favor of the material man, who had dealt with the husband. The court, speaking through Judge Stacy, said:

"This conclusion rests, not upon the fact that the property in question is owned by a married woman, for liens may now be acquired against the property of married women (C. S. 2434), but it is bottomed on the circumstance of no notice to the owner before settlement with the contractor. (C. S. 2438) Plaintiff seeks to meet this position by saying that, as the contractor was paid in advance, he had no opportunity of giving any notice to the owner prior to settlement with the contractor, and hence it should be held that none was necessary. In answer to this, it is sufficient to say that liens are statutory, and the statute gives no lien to a subcontractor or laborer in such a case."

The clear inference, in both of the above cases, is that if proper statutory notice were given, then a lien should attach to the wife's land in favor of the subcontractor who furnishes labor or materials to the husband.

G. H. J.

MANNING V. ATLANTIC AND YADKIN RAILWAY COMPANY—This recent case[1] was of such state wide interest (involving the so-called "dismemberment" of the old Cape Fear and Yadkin Valley Railroad) that there has been a demand from lawyers as well as laymen of the state for a concise statement of the facts and the law. The purpose of this note is to give that statement in brief form, without attempting any analysis of the authorities followed.

[25] *Payne* v. *Flack* (1910) 152 N. C. 600, 601, 68 S. E. 16.

[26] *Rose* v. *Davis* (1924) 188 N. C. 355, 356, 124 S. E. 576.

[1] *Manning* v. *Atlantic and Yadkin Railway Co.* (1924) 188 N. C. 648, 125 S. E. 555.

The general opinion was that Attorney General Manning brought the action in the name of the State to question the authority of the Atlantic Coast Line Railway Company and the Southern Railway Company to lease and divide the old Cape Fear and Yadkin Valley Railway. This is true, but a more intricate and involved set of facts is found in the history of the case.

In 1852 the General Assembly incorporated the Western Railroad Company which by its charter was authorized to build a railroad between Fayetteville and the coal regions in Moore and Chatham Counties.[2] The County of Cumberland and the Town of Fayetteville each subscribed $100,000. Individuals subscribed $135,000. Under another statute, the State gave more than $600,000 and later, by a bond issue in 1868, subscribed an additional sum of $500,000.

In 1879 the name of the Western Railway Company was changed, by authority of the General Assembly, to the Cape Fear and Yadkin Valley Railway Company, and legally stood in the place of the old Company. The new Company was also authorized to consolidate with the Mount Airy Railroad Company and to complete the roads.[3]

In 1883 there was a further reorganization of the road by the General Assembly which authorized further extensions and branches.[4] Later the South Carolina Pacific Railway running from Bennettsville, S. C., to the North Carolina line was leased. Thus the system from Wilmington to Mount Airy with numerous branch lines was operated by the Cape Fear and Yadkin Valley Railway Company until its dissolution. The road was valued at over $7,000,000, of which sum the State had donated and subscribed over $1,000,000.

On June 1, 1886 the Cape Fear and Yadkin Valley Railway Company executed to the Farmers Loan and Trust Company of New York as trustee, a deed of trust of all its property and franchise to secure a bond issues of $3,054,000; and on Oct. 1, 1889 it executed a consolidated mortgage on its property and franchise to secure an additional bond issue of $1,848,000.

In March, 1894, a default was made in the payment of interest, and the Farmers Loan and Trust Company brought suit in the

[2] Laws 1852, ch. 147.

[3] Pub. Laws 1879, ch. 67.

[4] Pub. Laws 1883, ch. 190.

Circuit Court of the United States for the Eastern District of North Carolina to foreclose the first mortgage.

On the day the bill was filed, John Gill was appointed receiver of the Cape Fear and Yadkin Valley Railway and took possession of its property. In the suit, an attempt was made to force a sale of the property in division and thereby dismember the system, but the court refused to permit such a sale and ordered the property sold as an entirety,[5] the reason being, among others, that an act, passed to amend section 698 of the Code, provided that a corporation created in consequence of a sale or conveyance of corporate property under a deed of trust should succeed to the franchise rights and privileges of the first corporation only in case the first corporation was sold as an entirety.

The case came up for rehearing and later went to the Circuit Court of Appeals but the decision was affirmed in both cases.[6]

The Commissioners appointed under the decree of the United States Court sold the property to the officers of the Wilmington and Western Railroad Company (now Atlantic Coast Line) for $3,125,000. These officers requested the conveyance to be made to the Atlantic and Yadkin Railway Company, which was done. This Company was incorporated by the General Assembly and the entire transaction ratified by an act of February 23, 1899. Thus the property of the Cape Fear and Yadkin Valley Railway Company was sold as an "entirety" to the Atlantic and Yadkin Railway Company pursuant to the decree of the United States Court.

On May 13, 1899, the directors of the Atlantic and Yadkin Railway Company, by deed sold outright that portion of the railroad between Wilmington and Sanford to the Wilmington and Weldon Railroad Company. Later the Southern Railway Company acquired all the stock of the Atlantic and Yadkin Railway Company and so became the owner of that part of the road running from Sanford to Mount Airy.

In 1913 the General Assembly passed a resolution, reciting the alledged dismemberment of the Atlantic and Yadkin Railway and empowered the Corporation Commission to investigate it. The Corporation Commission did subpoena witnesses and caused the books and papers of the corporation to be examined but nothing more was done.

[5] *Farmers Loan and Trust Co.* v. *C. F. & Y. V. Ry. Co.* (1897) 82 Fed. 344.
[6] *Low* v. *Blackford* (1898) 87 Fed. 392.

In 1923 the General Assembly passed a resolution authorizing the Attorney General to investigate and report the alleged dismemberment without delay, "and institute such action or actions as may be desirable or necessary to dissolve the alleged illegal dismemberment of said road, in order that it may be restored as a continuous east and west line as contemplated by the State in the granting of the original charter." This action was brought in pursuance of this resolution.

The plaintiff in his complaint alleged substantially as follows:

That the said purchase and dismemberment of the Cape Fear and Yadkin Valley Railway Company was contrary to law, in that it was conceived in fraud and for the purpose of evading the decree of the court which authorized the sale of said property as an entirety.

That it was for the purpose of deceiving and misleading the Legislature of North Carolina and evading the act of 1897, which made a sale under deed of trust, contingent on the sale of the property in its entirety.

That it was for the purpose of working a great injury to the people of North Carolina, and especially those living in the vicinity of the road.

That the said deed of the Atlantic and Yadkin Railway to the Wilmington and Weldon Railroad Company (now the Atlantic Coast Line) was fraudulent and contrary to law and therefore void and should be surrendered and cancelled.

That the property formerly composing the Cape Fear and Yadkin Valley Railway Company and purchased by the Atlantic and Yadkin Railway Company should be operated and its franchise enjoyed as an entirety.

To these allegations, the defendant demurred, contending:

That neither the plaintiff nor the State of North Carolina have any interest in the alleged cause of action.

That the complaint does not allege any facts, showing conspiracy to violate any law or public policy of the state, any fraud in the purchase or dismemberment of the railroad, the evasion of any acts of the Legislature, or the working of any injury to the people of the State.

That certain rules of the Interstate Commerce Commission have not been complied with. Also that certain federal laws, as the Anti-Trust Act, are involved which would defeat the jurisdiction of the State Court.

That the plaintiff has not shown good faith and due diligence since the sale of the Cape Fear and Yadkin Valley Railway was confirmed May 3, 1899, and that decree was not questioned until May, 1923, when this action was instituted. Such gross laches should estop the plaintiff from maintaining this action.

That since the foreclosure sale of the Cape Fear and Yadkin Valley Railway was in strict conformity to the decree of the Circuit Court of the United States, the said property was legally vested in the said purchasers and their successors in title, and that the rights of bondholders and other third parties are now involved.

Of the contentions involving federal questions, the court refused to consider any of them on the ground of lack of jurisdiction.

The demurrer of the defendants was sustained, first, on the ground that the sale by the Atlantic and Yadkin Railway Company to the Wilmington and Weldon Railroad Company was authorized by law and was therefore valid.

By the Private Laws of 1899, Chap. 98, sec. 6, the Atlantic and Yadkin Railway Company was authorized to consolidate with any other railroad company organized under the laws of the State on such conditions as might be agreed upon by and between the stockholders of the said companies. The court decided that, by virtue of this act, the first company had the power to sell and the second company had the power to purchase. They held that this statute must be construed according to the intention of the Legislature and not as to popular meaning. "The Legislature was presumed to know the facts, and, since it authorized the sale in question, its intention to do so must be conclusively presumed."[7] The fact that all the leases, mergers, and sales were not specifically authorized by amendments to the charters of the railroads made no difference. "The important thing is the grant of power, not the mode in which the power was granted."[8]

As to the allegations of fraud, the Court held that they were merely general allegations and not specific enough to be considered. Fraud could not be inferred when not specifically alleged. The demurrers did not admit fraud because the complaint did not show it.

The second proposition decided by the Court was that the plaintiff was estopped by laches to prosecute the action.

They held that the ancient maxim "Nullum tempus occurrit regi" obtains with us only in exceptional cases. As a main proposition of law, C. S. 420 was quoted "The limitations prescribed by law apply to civil actions brought in the name of the State or for its benefit in the same manner as to actions by or for the benefit of private parties." The court held this to be the law in this State in the absence of a specific statute to the contrary in a particular case.

The plaintiff contended that the doctrine of laches as administered by courts of equity was anagalous to statutes of limitations and that the defendants' misuser, nonuser and usurpation of corporate powers constituted a continuing cause of action to which no statute of limitations could apply.

[7] 188 N. C. 648, 660.
[8] 188 N. C. 648, 660.

The Court held contrary; that "independently of the statute of limitations, the doctrine of laches has existed since the beginning of equity jurisdiction. It rests on the principle that nothing can call into exercise the powers of a court of chancery but conscience, good faith and *reasonable diligence.*"[9]

A quarter of a century had elapsed since the dismemberment took place, and the court held that this was sufficient time to bar the plaintiff from maintaining the action, on the grounds, that a failure to bring the action before constituted *gross laches.* How long a time would be sufficient to bar the action was not considered by the court, but it held that "each case is to be determined according to its own peculiar circumstances and the question of laches is addressed to the sound discretion of the Chancellor."[10]

Mr. Justice Clarkson concurred in the result solely on the grounds of "laches," thinking that to overturn the dismemberment would work too great a hardship on innocent purchasers and bondholders.[11]

W. T. H.

Mortgagee's Interest in Insurance Policy Under Standard Mortgage Clause—It is customary whenever a mortgage is placed on real estate for the owner to take out insurance in which he is the beneficiary; and then to protect the mortgagee, by attaching to the policy the standard mortgage clause. The effect of this "rider" is to protect the mortgagee to the extent of his interest. No act or omission by the mortgagor, *unknown to the mortgagee,* can affect the mortgagee's interest in the insurance contract. In a recent North Carolina case,[1] the mortgagor sold the insured property, contrary to a clause in the policy providing that, "If any change, other than by death of the insured, takes place in the . . . title . . . of the subject of the insurance . . . This Company is not liable for damage or loss occurring." The Court said, in regard to the right of the mortgagee under the standard mortgage clause, "It is a generally accepted position that this clause operates as a separate and distinct insurance of the mortgagee's interest, to the extent at least of not being invalidated by any act or omission on the part of the owner or mortgagor, *unknown to the mortgagee;* and according to

[9] 188 N. C. 648, 665.
[10] 188 N. C. 648, 665.
[11] 188 N. C. 648, 667.
[1] *Bank* v. *Assurance Co.* (1924) 188 N. C. 747, 125 S. E. 631.

the clear weight of authority this affords protection against the previous as well as the subsequent acts of the mortgagor or assured."[2] The standard mortgage clause is almost universally held to act as an independant contract between the insurer and mortgagee.[3] Therefore if the mortgagor does any act whatever which will breach his contract of insurance with the company because of a condition in his policy, such as, misrepresenting his ownership in the insured property,[4] increasing the fire risk, failing to pay premiums,[5] or, as in the above case, conveying away his title in the insured property,[6] it will not prevent the mortgagee from recovering in case of loss.

If the ownership changes *with the mortgagee's knowledge*, then he cannot recover unless he notifies the company of such change, because of a provision in the standard mortgage clause which says, "The mortgagee or trustee must notify this Company of any change of ownership . . . which shall come to the knowledge of the mortgagee or trustee."[7]

In *Bank* v. *Assurance Company*,[8] Stacy J., presented the following quaere. "Whether the original parties to the contract could have canceled or rescinded the entire policy including the standard mortgage clause without the consent of the mortgagee or trustee mentioned therein." The North Carolina court has rendered no decision on this point but cited two cases relative to it. The first was an Iowa case[9] in which the Court held that where a third person by agreement in writing with a mortgagor, agreed to settle and discharge the mortgage debt when it became due, that he might, at any time before the mortgagee assented to and accepted such arrangement, cancel the same and be relieved of any liability because of his promise to pay such debt. In a Wisconsin case,[10] under facts similar to those in the Iowa case, except that the mortgagee assented to the arrangement by which a third party undertook to pay the mortgage

[2] 188 N. C. 747, 751.

[3] *Hastings* v. *Insurance Co.* (1878) 73 N. Y. 141; *Reed* v. *Fireman's Ins. Co.* (1911) 81 N. J. L. 523, 80 At. 462; *Eddy* v. *London Assur. Co.* (1894) 143 N. Y. 311; *Syndicate Ins. Co.* v. *Boston et al.* (1894) 65 Fed. 165.

[4] *State Ins. Co.* v. *Trust Co.* (1896) 47 Neb. 62, 66 N. W. 9 (false statement as to incumbrances).

[5] *Francis* v. *Buttler Fire Insur. Co.* 7 R. I. 159.

[6] *Phoenix Ins. Co.* v. *Trust Co.* (1894) 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679.

[7] *Continental Insurance Co.* v. *Anderson* (1899) 107 Ga. 541, 33 S. E. 887; *Cole* v. *Germania Ins. Co.* (1885) 99 N. Y. 36, 1 N. E. 38.

[8] (1924) 188 N. C. 747, 754.

[9] *Gilbert* v. *Sanderson* (1881) 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103.

[10] *Basset* v. *Hughes* (1877) 43 Wis. 319.

debt, the Court said that after knowledge of and assent to the new arrangement by the mortgagee, nothing that the original parties may do can affect his right of action on the new contract. These are the only cases cited as bearing on the question. It is evident that they are not directly in point, as they do not deal with insurance contracts or questions arising under the standard policy relative to cancellation. There seems to be one case in point in Maine, where A mortgaged his property to B and took out insurance with the defendant Company, attaching a standard mortgage clause in favor of B. Later B took possession of the property as mortgagee, and A canceled the insurance policy without B's knowledge. The Court held that B could recover from the Insurance Company and that the cancellation as to B was invalid.[11] In support of its decision, the Court cited a number of cases all holding that no act or breach of the contract by the insured could effect the interest of the mortgagee. The Court also contends that the provision in the standard mortgage clause stating that in order to cancel, the Insurance Company must give the mortgagee and the insured ten days notice, sustains their holding, since no notice was given to the mortgagee. There is a very strong dissenting opinion in this case, which claims that the cases cited are not in point, and also that the insurance policy expressly says that the *insured* may cancel at will and does not mention the mortgagee. Therefore the provision in the standard mortgage clause saying that the *Company* in order to cancel, must give ten days notice to the insured and the mortgagee, is not applicable, because in the case at bar, the insured and not the Company canceled the policy. The dissenting opinion concluded that the insured had the power to cancel and thereby defeat the mortgagee's interest in the policy.

A Michigan case[12] adds an interesting phase to the situation. It was there held, that although the insured may have a legal right to cancel the policy he had taken out for a surety's protection, he had no equitable right to do so, and that the surety had an equitable interest (measured by his interest in the first policy) in a second policy taken out after the cancellation, in which a third party was made the beneficiary. It seems that if there had been no second policy the surety's right against the Insurance Company would have been defeated because the Court goes on the premise that the insured

[11] *Gilman* v. *Ins. Co.* (1914) 112 Me. 528, 92 At. 721.
[12] *Miller* v. *Aldrich* (1875) 31 Mich. 408.

had a legal right to cancel; therefore this case is in accord with the dissent in the Maine case, in so far as the *legal* right of the insured to cancel is involved.

In conclusion, a Maine decision directly in point with the question presented by Stacy J., holds that the insured could not cancel and thus deprive the mortgagee of his interest in the policy, but there is a strong dissent which is based on sound reasoning, supported by the Michigan case which holds that the insured has a legal right to cancel but no equitable right to do so. The cases that the North Carolina Court cited relative to this quaere, if followed, intimate that it would hold that the insured could not cancel his policy without the consent of the mortgagee. However, if the case actually arose, an opposite result is altogether possible.

C. B. M.

Recent Types of Administrative Action in North Carolina—(1) *State Highway Commission*—Chapter 2 of the Public Laws of 1921 created the State Highway Commission and empowered it to carry out the provisions of the act; namely, the construction of a state system of highways. The Commission was to consist of a State Highway Commissioner and nine commissioners, one from each construction district, to be appointed by the Governor with the confirmation of the Senate. When not in session, the State Highway Commissioner is vested with the powers of the Commission.

In general, it is authorized to take over any road and "widen, relocate, change or alter the grade or location" of it.[1] A map is attached to the bill showing the proposed roads to be taken over for the state highway system. But it is provided that the Commission "may change, alter, add to or discontinue the roads so shown provided no roads shall be changed altered or discontinued so as to disconnect county-seats, principal towns, state or national parks or forest reserves, principal state institutions and highway systems of other states".[2] Other powers incidental to carrying out the provisions of the act are specifically granted, and the Commission furthermore is given "power and authority to make rules and regulations for carrying out the true intent and purposes of this act".[3]

The map attached to the bill showed a highway from Durham to Oxford, county-seats, through Stem. The Highway Commission

[1] Pub. Laws of 1921, Chap. 2, sec. 10 (b).
[2] Pub. Laws of 1921, Chap. 2, sec. 7.
[3] Pub. Laws of 1921, Chap. 2, sec. 4, sec. 10.

after investigation and hearings, decided to construct the road from Durham to Oxford through Creedmoor. Plaintiff sought to enjoin the Commission from constructing the road through Creedmoor, and the Court denied the injunction.[4] Adams, J., delivering the opinion of the Court, says that the action of the Commission may not be controlled by the court unless there is an abuse of discretion, as long as the Commission keeps within the limits of the powers granted it by the legislature. But the power of the Commission to change or discontinue roads is limited by the proviso that they shall not disconnect county-seats, principal towns, etc. He holds that the question of what is a principal town is a question for judicial determination, and the Court finds that Stem is not a principal town within the meaning of the act and therefore upholds the Highway Commission. Stacy, J., concurring in the result, says that what are principal towns is to be determined by the Commission exercising sound but not arbitrary judgment and subject to judicial review only in cases of abuse of discretion. Clarkson, J., dissenting, says that the principal towns referred to in the act are those shown on the map and that under no circumstances may a road disconnect these.

Besides the powers referred to above, the Commission is given other broad powers in relation to construction, letting of contracts, taking over roads, acquiring materials, enforcing legal rights, regulation of use of highways, establishing traffic census bureaus, maintenance of highways, naming and making the roads, beautifying them, and securing federal aid in construction.[5]

In case of taking over a road, the Commission must give notice and if objection is made, the Commission hears the objection under rules and regulations laid down by it for governing the proceedings, and determines the most practical and desirable route. Their decision is final.[6]

It is thus obvious that the Highway Commission is an administrative body similar in many respects to the Corporation Commission. Indeed in the first case that arose, *Road Commissioners v. Highway Commission*,[7] Clark, C. J., says, "Furthermore, in a broad view, the state in the construction of these highways is acting through an administrative body". The act creating the Highway Commission did not as in the case of the Corporation Commission provide for judicial

[4] *Cameron* v. *State Highway Commission* (1924) 188 N. C. 84, 123 S. E. 465.
[5] Pub. Laws of 1921, Chap. 2, sec. 10.
[6] Pub. Laws of 1921, Chap. 2, sec. 7.
[7] *Road Commission* v. *Highway Commission* (1923) 185 N. C. 56, 115 S. E. 886.

review. The Supreme Court seems to hold that if the Highway Commission keeps within the scope of the powers granted, the Court may interfere only in case of abuse of discretion, that is, unreasonable action.

(2) *Corporation Commission—Bank Examiners*—The Corporation Commission was given authority to appoint bank examiners whose duties were to make examination of banks.[8] The examiners were given the power to take possession of banks for purpose of making a thorough examination. They might compel attendance and examine under oath officers, directors, stockholders and individuals in regard to the affairs of the bank. If they found the bank in an unsafe condition the Corporation Commission might authorize the bank examiners, upon giving bond, to take possession of the property of the bank until the Corporation Commission received and acted upon the report of the examiner. The Commission might then apply for appointment of a receiver or it might grant the bank 60 days to make good the deficiency or loss.[9] The examiner also has the power to arrest without a warrant any officer guilty of a violation of the criminal laws relating to banks and banking and to hold him until a warrant can be served.[10]

In 1921 a new banking law was adopted[11] re-enacting to some extent the powers of the Corporation Commission and giving it greater power in regard to banks. Among other things it provides that the Commission may take possession of the business and property of any bank to which this act is applicable when it has violated its charter, is conducting business in an unauthorized or unsafe manner, has an impairment of capital stock and other like cases. Such banks may with the consent of the Corporation Commission resume business upon such terms and conditions as may be approved by it.[12] It further provides that ". . . . . it shall be its duty (Corporation Commission's) to execute and enforce through the Chief State Bank Examiner, the State Bank Examiners and such *other agents* . . . . . all laws . . . . . relating to banks as defined by this act."[13] The sections of the Consolidated Statutes above mentioned are virtually re-enacted.[14]

[8] C. S., sec. 249.
[9] C. S., sec. 250, 253.
[10] C. S., sec. 254.
[11] Pub. Laws of 1921, Chap. 4.
[12] Pub. Laws of 1921, Chap. 4, sec. 16.
[13] Pub. Laws of 1921, Chap. 4, sec. 63.
[14] Pub. Laws of 1921, Chap. 4, secs. 72, 73, 74, 75, 76, 77, 78.

In the case of *Taylor v. Everett*,[15] the State Bank Examiner, having made an audit of the People's Bank, found that there was an impairment of its capital stock. This is one of the cases in which the Corporation Commission may take possession of the bank, and it has authority to allow the bank to resume business upon such conditions as it may provide. The directors agreed to comply with the conditions laid down by the State Bank Examiner, whereupon he allowed them to continue business. A question arose as to the liability of the directors on the contract to one who was subrogated to the rights of the bank as beneficiary of the contract. They were held liable. In delivering the opinion, Connor, J., says, "A condition thus existed under which the State Bank Examiner, acting under the authority of the Corporation Commission, was empowered by law to take possession of the business and property of the People's Bank and to determine upon what terms and conditions it might resume business . . . . . the Commission or the bank examiner acting under its authority, instead of first taking possession of the bank and thus closing it, may impose terms and conditions upon which the bank may continue business. . . . ."[16]

It does not clearly appear whether the conditions were imposed by the Corporation Commission or the State Bank Examiner acting under authority from the Corporation Commission. But from an examination of the facts and opinion it is probable that they were imposed by the Chief State Bank Examiner. The case speaks of a letter from the State Bank Examiner in which he stated the terms upon which the Bank might resume business. If this is correct it seems to be a reasonable conclusion from the case that the Bank Examiner, acting under his general authority, but without the express direction or approval of the Corporation Commission, has power to impose conditions upon which a bank may continue or resume business.

What is the practice in regard to the imposition of these conditions is not known. It may be that the Bank Examiner has the conditions approved by the Corporation Commission before they are offered to the bank. It would appear, however, from a careful reading of the case that the Commission authorizes the state bank examiners to impose such conditions as are needed. Thus the Bank deals directly with the Bank Examiner and not with the Corporation Com-

[15] *Taylor* v. *Everett et al.* (1924) 188 N. C. 247, 124 S. E. 316. See also *Trust Co.* v. *Burke* (1924) 189 N. C. 69, 126 S. E. 163.

[16] 188 N. C. 247, 259.

mission. The Court in *Taylor v. Everett* intimates that this procedure is valid. This would seem to be a very practical way of dealing with the problem. The Examiner is an expert in the affairs of banks. The Corporation Commisson does not profess to be. He is the one who understands most clearly the affairs of the bank, having made the examination; therefore he is better qualified to say what are just conditions. Immediate action may be necessary and the delay in referring to the Commission might cause further complications. Suppose, however, the bank should object to the conditions imposed by the examiners and appeal to the Commission. It seems quite clear that the action of the Commission would control, as the power to impose the conditions is vested in the Corporation Commission by the statute. The statute further says that the Commission shall enforce the law "through the Chief State Bank Examiner, the State bank examiners and such *other agents*—"[17] thereby treating the bank examiners merely as agents of the Commission.

The two cases discussed illustrate the modern tendency of the courts to uphold administrative action where it is reasonable.[18] A statement of Justice Stacy in *Cameron* v. *Highway Commission* will illustrate this. He says, "Road building is not a matter of drawing lines upon a map; it partakes of scientific rather than legislative or judicial engineering."[19] It seems settled that the court will review the action of the Highway Commission only in case of abuse of discretion or exceeding their authority. As to the Corporation Commission, while there may be an appeal in certain cases so as to obtain a trial de novo in the Superior Court,[20] the decision of the Commis-

[17] Pub. Laws of 1921, Chap. 4, sec. 63.

[18] *Roumfort Co.* v. *Delaney* (1911) 230 Pa. 377, 79 Atl. 653 (upholding action of Factory Inspector in requiring alterations in factory for fire protection); *Cockroft* v. *Mitchell et al.* (N. Y. 1919) 187 App. Div. 190 (upholding order of Industrial Commission requiring additional means of exit in 16 story building used for manufacturing); *Borgnis* v. *Falk Co.* (1911) 147 Wis. 327, 133 N. W. 209 (upholding action of Workmen's Compensation Board); *Mutual Film Co.* v. *Ohio Industrial Commission* (1915) 236 U. S. 230 (upholding moving picture censorship); *Intermountain Rate Cases* (1914) 234 U. S. 476 (upholding power of Interstate Commerce Commission); *Hocking Valley Railway Co.* v. *Public Utilities Com.* (1915) 92 Ohio St. 9, 110 N. E. 521 (upholding action of Public Utilities Commission). There are many more cases similar to the above. See *Labor Law Administration in Pennsylvania* by Robert H. Wettach (1922) 70 U. of Pa. L. Rev. 277 for cases involving administrative action in industry.

[19] 188 N. C. 84, 90.

[20] *Commission* v. *Railroad* (1912) 161 N. C. 270, 271, 76 S. E. 554; see article by Charles L. Nichols, *Judicial Review of North Carolina Corporation Commission* (1924) 2 N. C. L. Rev. 69, 78.

sion is given great weight and presumed prima facie to be correct.[21] In a great majority of the cases, their action is also upheld unless it is unreasonable.[22] The power allowed bank examiners acting under the Corporation Commission is another illustration of the liberal view of the powers of administrative bodies. No more do the courts discuss the objection to administrative bodies that they are unconstitutional because of a delegation of legislative power or because they violate the doctrine of separation of powers.[23] They are a very efficient and, you might even say, indispensable means of administering law. Whatever may be the theories, government through administrative tribunals has worked and will undoubtedly continue to expand to wider fields.

C. W. P.

[21] C. S., sec. 1098.

[22] See discussion in Mr. Nichol's article, 2 N. C. L. Rev. 69, 80.

[23] 2 N. C. L. Rev. 69, 72, discussing *Express Co.* v. *Railroad Co.* (1892) 111 N. C. 463, 16 S. E. 393; *Film Corporation* v. *Industrial Commission* (1914) 236 U S. 230, 245; *Intermountain Rate Cases* (1914) 234 U. S. 476, 486.

The
North Carolina
Law Review

Volume Three June, 1925 Number Three

CHIEF JUSTICE HOKE, PATRIOT AND GREAT-HEARTED FIGHTER FOR THE RIGHT

WALTER PARKER STACY
CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT

On 16 March, 1925, William Alexander Hoke voluntarily retired as Chief Justice of the Supreme Court of North Carolina, such action being induced by the condition of his health. All will agree that he has had a unique and far-reaching influence upon the judiciary and life of the Commonwealth. The law of the State has been enriched by his labors, and it will feel the effects of his retirement.

Born in 1851, of noble ancestry, studied law under Chief Justice Pearson, admitted to the Bar in 1872, member of the State Legislature in 1889, elected Judge of the Superior Court in 1890 and served as such for fourteen years, married in 1897, nominated and elected Associate Justice of the State Supreme Court in 1904, reëlected to same position in 1912, and again in 1920, appointed Chief Justice 2 June, 1924, elected to the same position in November following, Democrat, Episcopalian, recipient of two honorary degrees, member Society of the Cincinnati—these in bold relief constitute the outstanding facts in the life of the subject of the present sketch.

It will be observed that his boyhood spans the days of civil strife, the time when all men's souls were tried and cast in heroic molds. His distinguished father, John Franklin Hoke, was appointed Adjutant-General of North Carolina at the outbreak of hostilities in 1861, and was afterwards elected Colonel of the Thirteenth Regiment; later he commanded the Twenty-third Regiment and subsequently served as Colonel of the Senior Reserves. Colonel Hoke always remembered with fatherly pride how his boy, a lad of only nine years, tried to follow him to the battlefield. This may seem of small moment now, but it was heroic then, and gave unmistakable evidence of the innate qualities which were later to develop in the man.

"Judge Hoke," as he is affectionately called, is not only fortunate in the stock from which he springs, but also in the temper of the era and the society of his young manhood which stimulated him to effort, evoked him to nobleness and spurred him to strength. It was not an age of materialism, but one of serious-mindedness. During the early years of his career the South, under the leadership of the heroes of the Confederacy, finally triumphed over the ruin and exhaustion of war, and found a way to rehabilitate itself honorably and without the surrender of cherished ideals or principles. It was a task which required the exercise of superb wisdom and rare statesmanship. Then, like all bruised and battered peoples, they turned instinctively to the younger generation for the realization of their hopes and for the coming true of their dreams. There was a fine spirit of determination in the atmosphere of the time, a broad conception of public duty, and a clear call to youth to put its hand to the plow and to spend itself, if need be, in high endeavor and for the upbuilding of the common good. W. A. Hoke heard and heeded this call with great credit to himself and in a manner eminently satisfactory to the people of his State. They have ever delighted to honor him for his sterling qualities, and today he stands second to none in their esteem and affection. Such is the reward of earnest effort, nobly expended. He has now reached that position of mental calm and tranquility of soul, so devoutly to be wished, and which comes only to the man who has lived a righteous life. The world is a little better for his having lived in it; he has added to the sum total of human happiness, and hence he deserves a permanent place in the annals of his time. To many, Judge Hoke is the embodiment of the hopes and aspirations of the people of North Carolina. He has dared to speak and speak again in their behalf and to give expression to their longings and desires. In this, he has made a distinct contribution to the life of the Commonwealth.

There is about him the meed of gentleness and the fruit of strength, the courage of the true and the stamina of the great, the heritage of the meek and the harvest of the bold. Truly, a noble soul. Which element predominates, we scarcely know. He has given a helping hand to all sorts and conditions of men. And long may it remain in this mixed world a mooted question, or at least a point not easy of decision, which is the more beautiful evidence of the Almighty's goodness, the delicate fingers that are formed for sensitiveness and sympathy of touch and made to minister to pain and grief, or the strong masculine hand that the heart teaches, guides and softens in a moment.

While on the Superior Court bench, Judge Hoke greatly endeared himself to the people of the State and especially to members of the legal profession with whom he came in intimate contact. His striking appearance and military bearing at once arrested attention and commanded respect wherever he went. A single incident will suffice to show his readiness and courage as a *nisi prius* jurist: A negro was brought into his court, charged with a capital assault upon a white woman. There was much excitement in the community over the occurrence. The crime had been committed only the day before. The defendant lodged a motion for a continuance upon the ground that he had not had time to summon his witnesses or to get ready for trial. It was suggested that a lynching would probably take place, if the case were not tried at that term of the court. To this the Judge promptly replied: "If there is to be any violence, it is better for the prisoner to be lynched by the mob than to be mobbed by the court." This nugget of truth and wisdom, so tersely and epigrammatically expressed, attracted the immediate attention of the whole State and the country at large. The case was continued for a week, the defendant given an opportunity to prepare his defense, and there was no lynching.

The opinions of Judge Hoke, appearing in fifty-three volumes of the Supreme Court Reports from the 137th to the 189th, both inclusive, and treating a wide range of subjects, will stand as a lasting tribute to his industry, learning and ability. The decision in *Hicks* v. *Manufacturing Company* (138 N. C., 319) was written by him during the first term of his incumbency on the Supreme Court and it is one of the leading cases in this jurisdiction, dealing with the questions of assumption of risk and contributory negligence as affected by the negligence of a master or employer, and limiting or modifying, as it does, some of the former decisions on the subject. Again, in *Cooper* v. *Railroad* (140 N. C., 209) and *McKinney* v. *Adams* (184 N. C., 562), the law of negligence received his attention, and profited by it. *Christopher* v. *Wilson* (188 N. C. 757) one of his latest opinions, *Bank* v. *Dortch* (186 N. C. 510), *Wallace* v. *Wallace* (181 N. C. 158), *Pugh* v. *Allen* (179 N. C. 307) and *Jones* v. *Whichard* (163 N. C. 241), among others, afford convincing proof of his mastery of the law of real property—a subject which all will agree has its many niceties and abstruse problems.

There is a quaintness about his style of writing, peculiarly his own, and which comes more from the vigor and integrity of his mind and from his knowledge of the masters of the law, such as Black-

stone, Coke and Littleton, than from any heat of passion or imaginative excess. His opinions in criminal cases are flavored with a devotion to constitutional principles and the right of every citizen to a fair and impartial trial in full accord with such principles. His pronouncements in *State* v. *Exum* (138 N. C. 599), *State* v. *Horton* (139 N. C. 588), *State* v. *Banks* (143 N. C. 652), *State* v. *Murphy* (157 N. C. 614), *State* v. *Barksdale* (181 N. C. 621), *State* v. *Hardin* (183 N. C. 815) and *State* v. *Springs* (184 N. C. 768), are sufficient to show the trend of his mind in dealing with the State docket.

Judge Hoke is not only an able lawyer and splendid judge, but he is a great spirit as well. In order to glimpse the man in the inner recesses of his thinking, we must turn to his opinions in equity cases and those dealing with public questions. A perusal of his deliverances in *Jones* v. *Commissioners* (137 N. C. 579), *Fayetteville Street Ry.* v. *Railroad* (142 N. C. 423), *May* v. *Loomis* (140 N. C. 350), *Gaylord* v. *Gaylord* (150 N. C. 222), *Atkinson* v. *Downing* (175 N. C. 244), *Broad Street Bank* v. *National Bank of Goldsboro* (183 N. C. 463), *Corporation Commission* v. *Manufacturing Company* (185 N. C. 17), *Cab Company* v. *Creasman* (185 N. C. 551), *Citizens Company* v. *Typographical Union* (187 N. C. 53—concurring opinion), *Small* v. *Morrison* (185 N. C. 586—concurring opinion), *Lacy* v. *Indemnity Company* (189 N. C. 24) will give the reader ample opportunity to assess his great worth as a chancellor and his invaluable service in conference on questions of public moment. In addition to writing the opinions in cases assigned to him while a member of the Supreme Court, he was ever ready to spend himself in debate or in research with his associates.

My friend and colleague is a man of strong character and of unusual attainments. Endowed by nature with an acute and analytical mind, logical and orderly in its processes, he early assumed a place of leadership at the bar and he has continuously maintained a position of influence throughout his long and useful career. His characteristic virtues are unwavering loyalty, sublime courage, and sincere, sympathetic friendship. Among the highest relations in life is that of genuine devotion one for another. Friendship, unalloyed by selfishness, and of the sacrificial kind, if need be, partakes of the best part of one's self. "He serves best who loves best." Judge Hoke believes in a gospel of justice, in a religion of morality and in the efficacy of instant reliance on a Greater Power. This is the real source of his strength and effectiveness. Four-square to every wind

that blows, he is the soul of honor, high-minded, straightforward, clean-cut, and withal a great-hearted fighter for the right. The lives of many have been enriched by the rare charm of his friendship, and in the hearts of those who know him best such is accounted to him for righteousness. The love and admiration of his associates, the universal regard and approval of the bar, the esteem and affection of a great people, alike testify to the fullness and completeness of his success.

William A. Hoke: lawyer, citizen, legislator, Judge of the Superior Court for fourteen years, Associate Justice of the State Supreme Court for more than nineteen years, and Chief Justice for nearly a year, a great public servant, husband, father, friend—faithful in all. This is the story of solid achievement and of service well rendered; an inspiration to all good citizens and especially to members of the legal profession; a prince among men and a benediction to his State. Long may he live to enjoy the fruits of his labors and to witness his own immortality.

EXTRATERRITORIAL OPERATION AND EFFECT OF CONFISCATORY DECREES OF THE SOVIET GOVERNMENT

JOHN PAUL TROTTER

MEMBER OF THE CHARLOTTE BAR, NORTH CAROLINA

In two recent cases[1] the Court of Appeals of New York considered the question as to what operation or effect is to be given by American courts to decrees of the Russian Soviet government ("Russian Socialist Federated Soviet Republic"), where the decrees intend the confiscation of private property—confiscations on a large scale having been actually made under several such decrees within the territory over which the Soviet regime has held sway by virtue of paramount force for nearly eight years—the government of the United States having steadfastly refused to accord recognition to the Soviet government as either the *de facto* or *de jure* government of that country.[2] Aside from the interest which the question arouses in the mind of those interested in the point of international law involved, the effect which the American courts give such decrees is of tremendous interest to American bankers,[3] insurance companies,[4] manufacturers and investors therein,[5] and others, as well as the agents or agencies in this country of not a few Russian corporations which are, or were, engaged in business in this country.[6]

Pursuant to its avowed purpose of "relieving the workingman from the oppression of capital," the Soviet government, shortly after having made its coup d'état in November, 1917, promulgated a number of radical and far-reaching decrees, the ostensible purpose of which was to make state monopolies of a number of the more important industries, among which may be mentioned the shipping

[1] *Sokoloff* v. *National City Bank* (1924) 239 N. Y. 158, 37 A. L. R. —, 145 N. E. 917, and *Fred S. James & Co.* v. *Second Russian Ins. Co.* (1925) 239 N. Y. 248, 37 A. L. R.—, 146 N. E. 369. See also the several recent cases decided by inferior courts of that state cited *infra.*

[2] An interesting discussion of the refusal of our government to recognize the soviet regime will be found in the opinion of Mr. Justice Andrews in *Russian Socialist Federated Soviet Republic* v. *Cibrario* (1923) 235 N. Y. 255, 139 N. E. 259.

[3] See, for example, the situations presented in *Gurdus* v. *Philadelphia Nat. Bank* (1922) 273 Pa. 110, 23 A. L. R. 1227, 116 Atl. 672, and *Sokoloff* v. *National City Bank, supra,* note 1.

[4] See, *Hennenlotter* v. *Norwich Union Fire Ins. Soc.* (1924) 124 Misc. 626, 207 N. Y. Supp. 588.

[5] See, *Bourne* v. *Bourne* (1924) 209 App. Div. 419, 204 N. Y. Supp. 866

[6] See, *Fred S. James & Co.* v. *Second Russian Ins. Co., supra,* note 1.

business, insurance, banking, woodworking, etc. As heretofore suggested, the wording of the decrees states their object to be to effect fundamental economic reforms, but it is not improbable that the fiats were actually issued to give legal color to contemplated seizures of private property needed to produce funds to maintain the government established after the overthrow of the short lived Provisional government of Kerensky; this is an omnipresent act of governments established through revolutions, as may be seen by a perusal of cases cited in the note, arising out of confiscations not only by the "comic opera" governments of Central and South America, but even nearer home.[7] At least, the Soviet government expeditiously effected its economic "reforms" by issuing decrees, under the hand of Lenin, ordering the seizure of the properties of the industries affected, declaring them to be the property of the state, dissolving the corporations or companies operating them, and declaring them to be nationalized[8] or amalgamated into departments of state.[9]

With the international business interests conducted in Russia and the large amount of business transacted in this country and elsewhere outside of Russia by Russian insurers, bankers, etc., the effect of such decrees was instantaneously and stunningly felt. And hardly had this blow been dealt in the English and American foreign business circles than the courts of those countries were asked to determine the effect to be given the decrees abroad.[10] The duty of considering, with a view to legality, decrees so flagrantly violative of Anglo-American economic and legal concepts, is not a pleasant one for the judges; but it is a duty.[11]

In giving, or refusing to give, effect to a decree of a foreign government, a consideration of prime importance is whether the

[7] 1 Moore, Int. Law Dig. 56, *et seq.* As to the sovereign right to confiscate private property, see 2 Wharton's Int. Law Dig. §248 (pp. 709, et seq.).

[8] See annotation in 37 American Law Reports as to the extraterritorial effect of the nationalization of foreign corporations.

[9] A full translation of several such decrees may be found in the judgments of their Lordships in the case of *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1925] A. C. 112, 40 Times L. R. 837, 68 Sol. Jo. 841, 93 L. J. K. B. N. S. 1084, 1098—H. L.

[10] *Aksionairnoye Obschestvo* v. *Sagor* [1921] 1 K. B. 456 (judgment reversed by the Court of Appeal in [1921] 3 K. B. 532, 11 B. R. C. 666, 90 L. J. K. B. N. S. 1202, 125 L. T. N. S. 705, 37 Times L. R. 777, 65 Sol. Jo. 604) seems to be the first case in which the question arose; the case is stated elsewhere in the note.

[11] "Revolutions and their anarchical legislation do produce results difficult to fit in with the legislation of orderly States. The judges can only endeavor to apply settled principles; legislation, or abstention by the Sovereign from recognition of anarchical States, must do the rest." Scrutton, L. J., in *Banque Internationale de Commerce* v. *Goukassow* [1923] 2 K. B. 693—C. A.

government issuing the decree is recognized by the political department of the government of the forum, for it is a rule that the courts must adopt the views of the office of foreign affairs;[12] otherwise, the courts would, perhaps, commit the diplomatic corps or policy, and perhaps give rise to a cause of war. For it is a firmly established principle of international law as interpreted by the courts of this country and England that, while the courts can refuse to recognize as valid the laws or decrees of an unrecognized foreign government, and may treat them as wholly without extraterritorial effect,[13] the laws of a foreign nation which has been accorded recognition by the foreign office must be recognized as valid and given effect,—at least, to the extent to which the jurisdiction of the law-enacting sovereignty extends,—no matter what the courts think of the morality or justice of the laws.[14] And this is true even though the

[12] 1 Moore, Int. Law Dig. § 75; *Oetjen* v. *Central Leather Co.* (1918) 246 U. S. 297, 62 L. ed. 726, 38 Sup. Ct. Rep. 309; *Aksionairnoye Obschestvo* v. *Sagor, supra,* note 10.

[13] *The Nueva Anna* (1821) 6 Wheat. 193, 5 L. ed. 239; *Sokoloff* v. *National City Bank, supra,* note 1; *Fred S. James & Co.* v. *Second Russian Ins. Co., supra,* note 1; *Bourne* v. *Bourne* (1924) 209 App. Div. 419, 204 N. Y. Supp. 866; *Joint Stock Co. of Volgakama Oil & Chemical Factory* v. *National City Bank* (1924) 210 App. Div. 665, 206 N. Y. Supp. 476; *Russian Reinsurance Co.* v. *Stoddard* (1925) 211 App. Div. 132, 207 N. Y. Supp. 574; *Hennenlotter* v. *Norwich Union Fire Ins. Soc.* (1924) 124 Misc. 626, 207 N. Y. Supp. 588; *Aksionairnoye Obschestvo* v. *Sagor* [1921] 1 K. B. 456, judgment reversed by the Court of Appeal (vide note 10, supra) which, however, approved the holding on the facts; *King of Two Sicilies* v. *Willcox* (1851) 1 Sim. N. S. 301, 61 Eng. Reprint, 116, 19 L. J. Ch. N. S. 488, 14 Jur. 751. Compare: statement of Fuller, Ch. J., in *Underhill* v. *Hernandez* (1897) 168 U. S. 250, 42 L. ed. 456, 18 Sup. Ct. Rep. 83; *O'Neill* v. *Central Leather Co.* (1915) 87 N. J. L. 552, L. R. A. 1917 A, 276, 94 Atl. 789. "If a foreign government, or its sovereignty, is not recognized by the Government of this country the Courts of this country either cannot, or at least, need not, or ought not, to take notice of, or recognize such foreign government or its sovereignty." Roche, J., in *Aksionairnoye Obschestvo* v. *Sagor* [1921] 1 K. B. 456 (refusing to accord extraterritorial effect to a confiscatory decree promulgated by the Soviet Government). See *The Nueva Anna, supra,* to the effect that the courts cannot accord recognition of validity to a confiscatory act of an unrecognized government. Similarly, it has been said by an inferior court of New York that our government never having recognized the Soviet government, certain decrees or edicts pronounced by it, by which the confiscation of much property was intended to be confiscated, had "no force or effect" and were of no importance in the case "except as interesting facts rending to fix dates." *Bourne* v. *Bourne, supra.*

[14] See among the numerous cases announcing this rule: *American Banana Co.* v. *United Fruit Co.* (1909) 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; *Oetjen* v. *Central Leather Co.* (1918) 246 U. S. 297, 62 L. ed. 726, 38 Sup. Ct. Rep. 309; *Monte Blanco Real Estate Corp.* v. *Wolvin Line* (1920) 147 La. 563, 85 So. 242; *Molina* v. *Comision Reguladora* (1918) 92 N. J. L. 38, 104 Atl. 450; *Murray* v. *Vanderbilt* (1863) 39 Barb. 140 (following *Hamilton* v. *Accessory Transit Co.* (1857) 26 Barb. 46; *De La O* v. *Consolidated Kansas City Smelting & Ref. Co.* (1918)—Tex. Civ. App.—, 202 S. W. 1027; *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse, supra,* note 9; *Aksionairnoye Obschestvo* v. *Sagor, supra,* note 10; *Wright* v. *Nutt* (1788) 1 H. Bl. 136, 126 Eng. Reprint, 83; *White, Child &*

foreign sovereign confiscates the property of its nationals, or even citizens of the forum, and affords them no redress,[15] although the rule was not applied in two early English cases.[16] It makes no difference ordinarily whether the foreign government has been recognized as the *de jure* government or only as the *de facto* government.[17] Furthermore, recognition is retroactive in this respect, validating the prerecognition acts of the foreign government.[18]

Bearing these facts and principles in mind, we may turn to a consideration of the cases of a present interest.[19]

Beney v. *Eagle, S. & B. Dominions Ins. Co.* (1922) 127 L. T. N. S. 571, 38 Times L. R. 616—C. A. The Lord Chancellor speaking in *Wright* v. *Nutt, supra,* of the law enacted by the Georgia Legislature shortly after the Declaration of Independence, attainting the Tory Governor and declaring a confiscation of his property: "It may be a question for private speculation, whether such a law made in Georgia was a wise or an improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be equally regarded by Courts of Justice here, whether in private speculation they are wise or foolish." To a similar effect is the following statement from the judgment of Warrington, L. J., in the *Sagor* Case, *supra,* considering the effect to be given by an English court to a decree of the Soviet government, which had been recognized by England: "It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country: 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the [validity of] acts of another done within its own territory.' Per Clarke, J., delivering the judgment of the Supreme Court of the United States in *Oetjen* v. *Central Leather Co.* [supra]." See also *Suits against Foreigners* (1794) 1 Ops. Atty. Gen. 45.

[15] Cases *supra* under note 14. See especially the judgment of the Lord Chancellor in *Wright* v. *Nutt* (1788) 1 H. Bl. 136, 126 Eng. Reprint, 83.

[16] See *Wolff* v. *Oxholm* (1817) 6 Maule & S. 92, 105 Eng. Reprint, 1177, 18 Revised Rep. 313; *Peru* v. *Dreyfus Bros.* (1888) L. R. 38 Ch. Div. 348, 57 L. J. Ch. N. S. 536, 58 L. T. N. S. 433, 36 Week. Rep. 492. See also the case of *Ogden* v. *Folliott* (1790) 3 T. R. 726, 100 Eng. Reprint 825, which is, however, easily distinguished, it being referable to the familiar principles of private international law that laws do not operate *ex proprio vigore* extraterritorially and that "the courts of no country execute the penal laws of another."

[17] See judgment of Bankes, L. J., of the Court of Appeal, in the *Sagor Case, supra,* note 10. See also as to this an article, *So-Called "De Facto" Recognition,* 31 Yale L. J. 469, where the author, a Barrister of the Inner Temple, concludes that the distinction between "Recognition Simply and De Facto Recognition" has no foundation in fact and rests upon a misapprehension.

[18] *Vide,* cases *supra,* note 14. Thus, President Wilson having in 1917 recognized the Carranzaist or Constitutional Government of Mexico as the *de jure* government of that country, the courts of this country recognized as valid governmental acts of that government confiscations of private property made by Villa and other general officers acting under Carranza prior to 1917. See *Oetjen* v. *Central Leather Co., supra,* note 14.

[19] For a full discussion of the question under consideration, see annotation in 37 American Law Reports (appended to the case of *Fred S. James & Co.* v. *Second Russian Ins. Co.* (239 N. Y. 248) on the subject, "Extraterritorial effect of confiscations of property and nationalization of corporations."

In June, 1917, one Sokoloff paid to the National City Bank of New York in New York $30,225 upon its promise to open an account in his favor in its branch in Petrograd, Russia, and to repay him this sum in rubles at such times and in such amounts as he might demand. The account was opened, and Sokoloff drew upon it, until in November, 1917, and February, 1918, checks were presented but dishonored, although he had a balance remaining of $28,365. Thereafter Sokoloff sued the bank in New York, and the defendant made the defense that in November, 1917, a revolution took place in Russia, after which the Soviet government was formed; that that government in the same month decreed the "nationalization" of all private jointstock banks organized under the laws of Russia or operating therein, took possession of them by force and decreed that they be merged in the State Bank of Russia, took possession of their assets, and assumed their liabilities; that the defendant's assets in Russia were confiscated, the accounts of depositors being credited to a revolutionary tax; that the plaintiff, Sokoloff, was aware of the probability of future political and governmental changes in Russia, and that it was contemplated by the parties that the agreement should be performed in Russia and should be governed by the laws of that country; in short, that Sokoloff's Russian deposit was seized and his title divested, and the bank's liability discharged. The case, *Sokoloff* v. *National City Bank*,[20] finally reached the Court of Appeals of New York, which affirmed the judgment of the court of the appellate division for the plaintiff.[21] The decision, given in an opinion by Mr. Justice Cardozo, is based upon the rule, stated above, that English and American courts do not feel themselves bound to accord the weight of law to the decrees of unrecognized governments, or, as expressed in the opinion, "acts or decrees, to be ranked as governmental, must proceed from some authority recognized as a government de facto." Thus, the Court of Appeals, in refusing to accord the weight of law to the decrees invoked in defense, regarded them as wholly without legal effect in this country, and sustained the bank's liability without regard to the fact that the actual paramount political force of the place where the obligation was payable had liquidated the bank's liability.[22]

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[20] *Supra*, note 1.

[21] *Sokoloff* v. *National City Bank* (1924) 208 App. Div. 627, 204 N. Y. Supp. 69.

[22] In so holding the learned court observed that courts of high repute have held that confiscation by a government to which recognition has been refused has no other effect than seizure by bandits or other lawless bodies, and said that "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it."

But the New York court was careful in so holding to observe that it would be hazardous to say that the rule of decision (vide statement in note 22) is not subject to exception under pressure of some insistent claim of policy or justice, but should be subject to "self-imposed limitations of fairness." This suggestion of a limitation to the rule, while sustained by no decision[23] and opposed by judicial utterances made by other courts,[24] is without doubt a sound dictum, sustained by both reason[25] and analogy.[26] In respect of confiscatory decrees, exceptions may be taken to the rule in favor of the victim of the spoliation, but the rule may perhaps be applied with full rigor against the spoliator.[27] The limitation suggested to the operation of the rule is pure *obiter,* however, the facts of the case not calling for any exception of the rule. The bank was not a bailee of the deposit,[28] and the assets of the bank were not earmarked to Sokoloff's use, were not a physical object, but a mere chose in action; there was an executory contract by the bank to respond to the depositor's written demands for rubles, which the bank refused to perform. Nor was the defendant corporation's legal liability affected by the attempt of the Soviet government to terminate its existence—only the sovereignty creating a corporation can extinguish its creature, though a foreign sovereign within whose domain it has extended its activities can terminate them there; nor was the deposit made upon the security of the bank's assets in Russia; and, as to the assumption by the

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[23] See, however, *Gurdus* v. *Philadelphia Nat. Bank* (1922) 273 Pa. 110, 23 A. L. R. 1227, 116 Atl. 672.

[24] See *The Nueva Anna, supra,* note 13, and the quotation of a judge of the court of Kings Bench, in note 13, *supra.*

[25] Effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments in fact, e. g., the present government of Russia which has actually held the reigns of government in that country, with or without the consent of the governed, since November, 1917, and has been accorded *de jure* recognition by England, France, Japan, China, and many other countries. It is true, as observed in the opinion in the *Sokoloff Case,* that consequences appropriate enough when recognition is withheld on the ground that rival factions are still contending for the mastery (*e. g.,* the situation in Mexico from 1912 to 1915, or later) may be in need of readjustment before they can be fitted to the growing practise of withholding recognition whenever it is thought that a government, though functioning unhampered, is, because of its policies, unworthy of reception into the society or "family" of nations.

[26] *Vide, Williams* v. *Bruffy* (1878) 96 U. S. 176, 24 L. ed. 716, and 1 Moore, Int. Law Dig. 56, et seq.

[27] See *Russian Socialist Federated Soviet Republic* v. *Cibrario* (1923) 235 N. Y. 255, 139 N. E. 259, not a case involving a confiscation, and see also the holding of the court of Kings Bench in the *Sagor Case, supra,* note 10.

[28] Had the defendant been a bailee, surrender of the subject of the bailment to an overwhelming force would, it seems, have excused the defendant even though the force confiscating the subject acted wholly beyond the pale of law.

State Bank of Russia of the dissolved bank's liabilities, there was in the case no suggestion of a novation whereby the State Bank was substituted as debtor; and, the bank's assets having already been confiscated at the time the decree was passed confiscating the accounts of depositors as a revolutionary tax, the subsequent decree was held not to operate to the benefit of the bank.[29] The doctrine of frustration, invoked by the defendant, was held to have no application to the case, since the action was for restitution and not damages; and it was held not to have been shown that the parties intended to have the obligation depend upon events in Russia.

The rule of decision applicable to confiscatory decrees of the Soviet government announced in *Sokoloff* v. *National City Bank, supra,* has been approved and applied by the same court, in *Fred S. James & Co.* v. *Second Russian Ins. Co.,*[30] and applied by inferior courts in that state in several cases;[31] and substantially the same rule

[29] As to this point the court said: "Certain we think it is that a decree of confiscation directed against depositors does not reduce the liabilities of a bank which has already yielded up its assets in virtue of a decree of confiscation directed against itself. In such a situation the later decree, if it is to be given any effect at all, must speak the voice of a power recognized by us as sovereign."

[30] (1925) 239 N. Y. 248, 37 A. L. R.—, 146 N. E. 369. The rule was applied in this case in upholding the liability of a Russian corporation upon certain reinsurance contracts to the American assignee of an English insurance company which had reinsured a number of risks with the defendant Russian corporation, which, while engaged in business in New York, sought to avoid liability through invoking Soviet decrees nationalizing it, confiscating its assets and assuming its liabilities. A further circumstance urged in defense in this case, was the fact that England had, in addition to recognizing Russia, entered into a trade agreement with that country, which was contended by the defendant to have confirmed the confiscation of the property of Russian nationals, the defendant urging the rule that the American assignee (plaintiff) took no better claim than its assignor had, and that the assignor's claim had been extinguished; but this was held not to be the effect of the trade agreement. The court held, in response to the defendant's contention that it had been nationalized, that neither justice nor policy required the court to give effect to the decree of nationalization of the unrecognized Soviet government, especially since the defendant had continued to exercise its corporate functions in New York subsequent to the decree purporting to terminate its legal existence. The court said that the decree-pronouncing government being at the time of the judgment unrecognized, the problem before it was not determinable by any technical rules but by "the largest considerations of public policy and justice," and that neither public policy nor justice required it to recognize the legal extinguishment of the Russian corporation as a means to the nullification of its just debts. As to the defense that the defendant corporation's assets had been confiscated, the court said that the decree of confiscation was *brutum fulmen,* and continued: "Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum," and this decree was held to be in no true sense a decree of bankruptcy.

[31] Decrees of the Soviet government, confiscating property and nationalizing corporations, have also been denied operation or recognition as lawful, among other cases,—

was held applicable to the decrees in England before that country accorded recognition to the Soviet government.[32]

But, on the other hand, the courts of England, after recognition by Great Britain of the Soviet government as the *de facto* and later the *de jure* government of Russia, applied to the decrees of the present Russian government the principle heretofore stated as applicable to that situation. The different rules applicable where the confiscating government has been recognized and where recognition has been refused are perspicuously illustrated in the Court of Appeals decision of the *Sagor* Case, (*supra*, note 10) where the judgment of the court of King's Bench (stated in note 32) was reversed solely upon the ground that recognition had been accorded Russia subsequent to the former judgment rendered in the case. So, in several cases, the English courts recognized the validity of Russian fiats, holding that they effectually divested the title of owners of private property, under the view that such was their intended operation.[33]

So, the rule stated above was applied in England, with full effect, being given the radical decrees of the Soviet regime, until two important and perhaps far-reaching cases came before the House of Lords, wherein their lordships, in lengthy judgments, made a reëxamination of the Russian decrees and unanimously concurred in the view that the decrees were not intended by the Soviet government actually to terminate the legal existence of the corporations affected,

—where the defense was made that a Russian corporation had no capacity to sue, its nationalization having been decreed. *Joint Stock Co. of Volgakama Oil & Chemical Factory* v. *National City Bank* (1924) 210 App. Div. 665, 206 N. Y. Supp. 476; *Russian Reinsurance Co.* v. *Stoddard* (1925) 211 App. Div 132, 207 N. Y. Supp. 574.

—where a Russian corporation sought to avoid being made a party defendant, over its contention that it was "an arm or part of the Soviet government of Russia." *Hennenlotter* v. *Norwich Union Fire Ins. Soc.* (1924) 124 Misc. 626, 207 N. Y. Supp. 588.

—where it was contended that at a material time large assets of the Singer Sewing Machine Company in Russia had been lost through confiscations by the Soviet government. *Bourne* v. *Bourne* (1924) 209 App. Div. 419, 204 N. Y. Supp. 866.

[32] *Aksionairnoye Obschestvo* v. *Sagor* [1921] 1 K. B. 456, holding an English purchaser of plywood confiscated by the Soviet government and imported into England took no valid title thereby as against the victim of the spoliation, a Russian corporation which sought, and was allowed, to recover the plywood after its importation into England. See, note 10, for the final disposition of this case.

[33] *Aksionairnoye Obschestvo* v. *Sagor* (Court of Appeal) *supra*, note 10; *White, Child & Beney* v. *Eagle, S. & B. Dominions Ins. Co.* (1922) 127 L. T. N. S. 571, 38 Times L. R. 616—C. A.; *The Jupiter* (1924) 40 Times L. R. 673, judgment affirmed in L. R. [1924] Prob. 236, 40 Times L. R. 815, 93 L. J. Prob. N. S. 156—C. A. See also the Court of Appeal and King's Bench judgments of the two House of Lords cases cited *infra*, note 34.

but merely stated a present policy of change and contemplated a future extinguishment of them.[34] These two cases are very interesting in a general survey of the subject, but under the view taken by their lordships of the cases they are beyond the scope of the note, a plea, *inter alia*, that obligations claimed by the plaintiff Russian bank had been transferred to the Russian government by its decrees not being necessary to a determination of the case, since the Russian government had laid no claim to the obligations. But, since the United States does not recognize Russia, and, as heretofore seen, our courts need not give effect to its decrees confiscating private property and dissolving its corporations unless public policy or private justice requires that they be recognized as proceeding from a quasi-governmental authority, a determination of the intended effect of the decrees is not important in this country, in cases not so giving effect to them,[35] though it would, of course, be necessary in cases where they were given the effect of law; and in such cases the interpretation given the decrees and the view taken of their intent by the courts or lawyers of Russia would doubtless be conclusive upon foreign courts.

[34] *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse, supra,* note 9; *Banque Internationale de Commerce* v. *Goukassow* [1925] A. C. 150.

[35] See *Fred S. James & Co.* v. *Second Russian Ins. Co., supra,* note 1.

The
North Carolina Law Review

Volume Three | June, 1925 | Number Three

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Published in February, April, June and December, for The School of Law, by the University of North Carolina, Chapel Hill
The University of North Carolina Press

NOTES AND COMMENTS

MEETING OF NORTH CAROLINA BAR ASSOCIATION—The 1925 Annual Meeting of the North Carolina Bar Association will be held on July 1, 2 and 3 at Asheville, with headquarters at the new Battery Park Hotel. Beginning at 8:30 P. M. on Wednesday, July 1st., the sessions will continue throughout Thursday and end on Friday morning. One of the most interesting features of the Meeting will be the motor trip to the top of Mt. Mitchell, following the close of the Friday morning session. The start is scheduled for ten o'clock, and a luncheon will be given by the Buncombe County Bar. Those attending the Meeting may be assured of a good time in addition to an excellent program.

The principal event of the first session, at 8:30 P. M. on Wednesday, is the address of the President of the North Carolina Bar Association, Hon. G. V. Cowper of Kinston, on "The Administration of Justice in North Carolina, its Difficulties and Suggested Remedies."

At the morning session on Thursday, July 2nd., at 9:30 o'clock, the following addresses will be made:

"The Cape Fear Bar," by Hon. John D. Bellamy.

"The Practise of Peace," by Hon. Daniel W. Iddings of Dayton, Ohio.

"The Judiciary," by Hon. J. H. Dillard.

At this session, matters of large significance to the Bar of North Carolina will be presented by Chief Justice W. P. Stacy in his report of the Judicial Conference.

The Thursday afternoon session at 3 o'clock will be given over to a Legal Round Table Conference, with the following interesting topics for discussion:

1. What should be the educational prerequisites for admission to the Bar? Led by George E. Butler of Clinton.

2. How can we relieve the congestion of our court dockets? Led by Louis M. Bourne of Asheville.

3. What should be done to improve our jury system? Led by Associate Justice L. R. Varser.

From 5:00 to 7:00 P. M., there will be a Garden Party by Hon. Mark W. Brown and Mrs. Brown at their residence, "Many Oaks." Following this at 8:30 P. M., there will be an address by Hon. Finis J. Garrett, of Tennessee, on "Amendments to the Federal Constitution."

A business session on Friday morning at 9:15 and election of officers will bring the 1925 Bar Association Meeting to a close. The accessibility of Asheville, the interesting program and the good time which is assured merits a large attendance.

Loss of Consortium in North Carolina—The right of one spouse to recover for the loss of the consortium[1] of the other has gone through many changes in North Carolina before arriving at the present holding in *Hinnant* v. *Power Company*.[2]

At common law this right existed only in the husband since he was regarded as the dominant member of the marital union. He was entitled to his wife's custody, her services, and her conjugal affection; and any infringement of these gave rise to a cause of action in him, as thereby his rights were directly infringed upon. It made

[1] Bouvier defines this as "The right of the husband and wife respectively to the conjugal fellowship, company, coöperation and aid of the other."
See, "The Change in the Meaning of Consortium" by Evans Holbrook, 22 Mich. L. Rev. 1.

[2] *Hinnant* v. *Power Co.* (1924) 189 N. C. 120, 126 S. E. 307.

no difference if the interference of the husband's rights was intentional or caused by negligence. If the proprietary rights of the husband were infringed upon it was a direct injury to him for which he could recover.

The wife at common law did not have any legal right to her husband's consortium. Blackstone, after discussing the rights of action of the "superior party" for the dissolution or any breach of the marital relation, says, "the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."[3] Also the wife could not bring suit in her own name, and any recovery would have gone to the husband, since he was entitled to all her personal property. So if the wife was allowed to sue in her own name for an intentional invasion of the marriage relation (as adultery, alienation of affections, etc.) whereby she suffered through the loss of the husband's consortium, it would amount to the husband deriving benefit for his own wrong, as he necessarily was a guilty party thereto; and if the wife was allowed to recover for an unintentional interference (as negligent injury, etc.) it would amount to the husband recovering twice for the same injury, as he also had a right of action therefor.

The Married Womens Acts[4] greatly changed the idea of consortium. Recovery by the husband is still allowed for loss of consortium, but the basis for the recovery has undergone a change. The husband's right to recovery seems now to be based more on the idea that he has suffered a personal and pecuniary loss from the invasion of the marriage relation, by the loss of his wife's companionship and the habitual household services[5] she was wont to perform for him, than on the idea of an invasion of the common law rights over his wife's person.[6] This change from the common

[3] 3 Blackstone 142.

[4] Property of married woman secured to her, C. S. sec. 2506, N. C. Const. 1868, art. X, sec. 6; Capacity to contract, C. S. sec. 2507 (Martin Act. 1911); Earnings of married women and damages recovered for personal torts are her sole and separate property, C. S. sec. 2513 (1913).

[5] The recent case of *Glanville* v. *the C. R. I. and P. Ry. Co.* (1923) 196 Iowa 456, 193 N. W. 548 seems to hold also that a wife can recover damages resulting from her inability to perform her household duties as the Court holds that "the Iowa statute permitting a woman injured by negligence to recover for loss of time allows a married woman recovery for impairment of her capacity for manual labor as a wife and mother."

[6] *Holleman* v. *Harward* (1896) 119 N. C. 150, 34 L. R. A. 803, 25 S. E. 972, gives recovery to the husband for loss of companionship and services of wife caused by defendant continuing to sell drugs to his wife over his protest. The Court speaking through Justice Montgomery says "A married woman notwithstanding her greatly improved legal status still owes to the husband the duty of companionship and of rendering all such services in his home as her relation of wife and mother require her."

law holding is seen in the many cases now holding that the husband can recover only for a direct and intentional invasion, and not where there is negligence alone causing the injury to his right of consortium.[7] The reasons for this holding are that the right of action is vested in the person injured, or the personal representative in case of action for wrongful death, and to allow the other spouse to recover would be allowing two recoveries for the same cause of action; also the damages caused by loss of consortium through negligence are too remote and consequential to allow recovery therefor.

It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the martial relation.[8] In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled.[9] The husband's right to recovery for loss of consortium was also settled, but whether he could recover for an invasion of his right to consortium when caused by negligence alone was a matter of some dispute. *Kimberly* v. *Howland*[10] and *Bailey* v. *Long*[11] appeared to hold that the husband could recover where the invasion of the marital relation was not intentional.

This was the situation confronting the Court when the case of *Hipp* v. *Dupont*[12] came up for decision. In that case the plaintiff's husband had already recovered in Virginia for his personal injuries alleged to have been caused by the defendant's negligence; and the

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[7] *Whitcomb* v. *R. R.* (1913) 215 Mass 440, 102 N. E. 663; *Bernhart* v. *Perry* (1919) 276 Mo. 612, 208 S. W. 462; *Blair* v. *Seitner Dry Goods Co.* (1915) 184 Mich. 304, 151 N. W. 724; *Feneff* v. *N. Y. Cent. R. R. Co.* (1909) 203 Mass 289, 89 N. E. 436.

[8] *Brown* v. *Brown* (1899) 124 N. C. 19, 32 S. E. 320 (Sale of drugs to plaintiff's husband); *Torner* v. *Heavrin* (1918) 182 Ky. 65, 206 S. W. 23, action in the nature of criminal conversation for adultery with husband; *Geromini* v. *Brunelle* (1913) 214 Mass. 492, 102 N. E. 67, 46 L. R. A. N. S. 465, alienation of husband's affection.

[9] *Brown* v. *Brown* (1899) 124 N. C. 19, 32 S. E. 320.

[10] *Kimberly* v. *Howland* (1906) 143 N. C. 398, 7 L. R. A. N. S. 545, 55 S. E. 778. Plaintiff's wife had been injured through defendant's negligence and the Court said "it seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage as where he is put to expense, or is deprived of the society or services of his wife, he is entitled to recover therefor, and he may sue in his own name."

[11] *Bailey* v. *Long* (1916) 172 N. C. 661, L. R. A. 1917 B, 90 S. E. 809. Plaintiff sued defendant for causing wife to catch cold thereby suffering death by the failure to properly keep his hospital in repair while wife was an inmate there. The Court allowed the plaintiff to recover for the damages suffered by him.

[12] *Hipp* v. *Dupont* (1921) 182 N. C. 9, 108 S. E. 318, 18 A. L. R. 873.

plaintiff then brought her action for damages which she alleged she personally had suffered from the same injury, as: (1) expenses paid by her, made necessary by her husband's injuries; (2) services performed in nursing and caring for him; (3) loss of support and maintenance; (4) loss of consortium; (5) mental anguish. Recovery was allowed on all five points, including loss of consortium. In regard to consortium, Chief Justice Cark went deeply into the subject of married women's rights, and concluded that to-day the rights arising out of marriage were identical for the wife and the husband. He then cited cases which apparently held that the husband had the right to recover for loss of consortium when caused by negligence alone.[13] Thereby, he reached the natural conclusion that a wife could recover for loss of consortium, even though there was no direct and intentional invasion. The case was new and gave rise to much comment.[14] The late Dean McGehee disapproved the holding as to recovery for loss of consortium, for the reason that the damages were too remote. In commenting on this case, he says in part: "Her losses are remote and consequential. With regard to her husband's consortium, it is not the natural and probable consequence of a physical injury to decrease the society, companionship and affection between the spouses; and loss which results to her can only be because the consortium of which she is still in the enjoyment is less satisfactory and valuable than formerly. It is remote and consequential."[15] In summarizing the cases for and against the holding in the *Hipp* case allowing recovery for loss of consortium through negligent injury, Dean McGehee said:

"The *Hipp* case says: 'Our precedents established that such damages are not remote for the husband, and on parity of reasoning they are not remote for the wife.'

"The opposing cases say: 'Such damages can be recovered by neither spouse. To allow the wife to recover for merely consequential unintentional losses resulting from negligent injury to the husband is opposed to the principle refusing consequential and remote damages and is not supported by any analogous line of cases. Old precedents allowing the husband to recover for injuries to the wife avail nothing, as they are founded on a barbarous exploded theory

[13] *Kimberly* v. *Howland* and *Bailey* v. *Long, supra,* notes 10 and 11.

[14] 22 Mich. L. Rev. 1 (favorable to *Hipp* case). 35 Harvard Law Rev. 343 (approves *Hipp* case). 1 N. C. Law Rev. 34 (disapproves *Hipp* case).

[15] *Wife's separate action for personal injury to Husband,* 1 N. C. Law Rev. 34, 35.

of the husband's ownership of the wife at a time when she was considered an inferior.' "[16]

The same question came up for decision again in *Hinnant* v. *Power Co.*,[17] in which the husband was killed through the defendant's negligence, whereas in the *Hipp* case, the husband survived the injuries. This distinction did not affect the result, as the principles of law involved are the same. In the *Hinnant* case, the personal representative of the plaintiff's husband had already brought suit[18] under the North Carolina statute,[19] giving an action for wrongful death resulting from defendant's negligence. Judgment was recovered against the defendant Power Company, and it had been paid. The plaintiff then brought her action to recover damages for loss of consortium and for mental anguish resulting from her husband's death caused by the same negligence. Justice Adams, in a learned and searching opinion, followed the Hipp case to the extent that the husband and wife have equal statutory rights of recovery for loss of consortium. But after a review of the authorities[20] used to support the Hipp case, it was held that the Common Law right of the husband to recover for every invasion of the right of consortium had been done away with by the Married Womens Acts, and that now the husband could only recover for a direct and intentional invasion. That the damages by loss of consortium from negligent injuries, whether death results or not, are too remote and consequential. Therefore, since the husband could not recover for negligent invasion of the consortium, neither could the wife, and especially as she did not have this right at common law and it had not been given to her by any statute. Neither was the wife allowed to recover for mental anguish suffered, since, in the language of the court, "mental anguish unrelated to any other cause of action, is not sufficient basis for the recovery of substantial damages."

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[16] 1 N. C. Law Rev. 34, 36.

[17] *Hinnant* v. *Power Co.* (1924) 189 N. C. 120, 126 S. E. 307.

[18] *Hinnant* v. *Power Co.* (1924) 187 N. C. 288, 121 S. E. 540.

[19] C. S. 160.

[20] The Court, intimating that these cases were not authority to uphold *Hipp* v. *Dupont*, said of *Kimberly* v. *Howland*, "We do not understand that decision to be authority for the position that the husband has the legal right, without regard to the loss of his wife's services, to recover remote and consequential damages arising from her personal injury."

The recovery in *Bailey* v. *Long* was held to be based on a contractual right between the plaintiff and defendant whereby the defendant should have taken proper care of plaintiff's wife while an inmate in defendant's hospital.

Hipp v. *Dupont*[21] is clearly overruled, but husband and wife are left on an equal footing. Either husband or wife may recover for loss of consortium where there has been an intentional and direct invasion, but neither husband nor wife may recover for negligent invasion of the consortium.

C. G. B.

Attachment of Stock in Foreign Corporation—In *Parks* v. *Express Co.*,[1] the defendant, a Georgia corporation, doing an express business in this state and having property herein, incurred a liability to a shipper for breach of its contract for the transportation and delivery of a shipment. The defendant corporation afterwards became absorbed in the American Raiway Express Company, a Delaware corporation, carrying on the same business with the same property as the defendant company. It was held that stock in the American Railway Express Company belonging to the defendant was subject to attachment in this state, where the cause of action arose, and the fact that the certificates of stock were not physically within the state was immaterial.

The problem suggested by the decision is whether shares of stock owned by a non-resident in a foreign corporation are subject to attachment in this state, when the corporation carries on business and has property here, even though the stock certificates are not within the state.

The defendant resisted the attachment upon the ground that the sections of the Consolidated Statutes[2] under which the action was brought did not authorize such attachment, and, if it did attempt to do so, it was beyond the legislative power. Attachment, being an extraordinary and summary remedy, a strict compliance with the statutory provisions is usually required,[3] although there are cases which hold that an attachment will not be dissolved where there is substantial compliance with the statute.[4] In either case, the law of the state in whose courts the remedy by attachment is sought must

[1] *Parks* v. *Express Co.* (1923) 185 N. C. 428, 117 S. E. 505.

[2] C. S., secs. 816, 817, 818, 819.

[3] *Carson* v. *Woodrow* (1912) 160 N. C. 143, 75 S. E. 996; *Parker* v. *Scott* (1870) 64 N. C. 118; *Leak* v. *Moorman* (1868) 61 N. C. 168.

[4] In other North Carolina cases the court, having regard to the intent of the legislature, inclined to the liberal construction, independently of express statutory provision. When it appears from the whole record that the statute has been substantially complied with, the attachment will not be dissolved. *Best* v. *British and American Mortgage Co.* (1901) 128 N. C. 351, 38 S. E. 923; *Grant* v. *Burgwyn* (1878) 79 N. C. 513.

[21] See note 12, *supra*.

be complied with before a court can assume jurisdiction. But assuming such a compliance with statutory provision, there remains the larger question of jurisdiction over the property attached. A court must have power over the property, or, in other words, the property attached must be within the jurisdiction of the court.

Jurisdiction refers both to the power of the court to move in any event by means of this particular process—jurisdiction over the subject matter—and also to the authority of the court to move in the proceeding, as dependent upon compliance with the formalities prescribed or the existence of the necessary grounds at the time the remedy is asked for. As in other actions in rem, the proceeding in attachment is based upon a claim to property and jurisdiction does not exist unless a claim to property is made the basis of the suit. Since the object of the suit is to obtain property, the court having power over the property has jurisdiction to maintain the suit. The court cannot exercise its jurisdiction unless there is property upon which it can operate.[5] The issue of the writ and its levy upon property within the state bring the property within the jurisdiction of the court and also give the court jurisdiction over the defendant to the extent of his interest in the property.

Where the property attached is a chattel or any tangible personal property, no difficulties arise in determining jurisdiction over the property, as presence within the state is sufficient. The determination of the situs of a chattel is a question of fact, and jurisdiction depends upon the chattel being within the state.[6]

Where the property attached is a debt, the presence of the debtor is held to be enough to confer jurisdiction. The situs of a debt for purposes of attachment is said to be with the debtor.[7] Thus a debt may be attached if there is a general law which provides for the attachment of debts and if the garnishee is found and process personally served upon him within the state. "It seems to be conceded that if the creditor of the garnishee can sue the latter in this state, then the plaintiff can proceed here against the garnishee."[8] Although there are serious objections to this, the rule is well established, and a judgment against the garnishee in such a case is entitled to full faith and credit.[9]

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[5] *Pennoyer* v. *Neff* (1878) 95 U. S. 714; *Woodruff* v. *Taylor* (1847) 20 Vt. 65; *Balk* v. *Harris* (1898) 122 N. C. 64, 30 S. E. 318; *Green* v. *Van Buskirk* (1866) 5 Wall 307, 18 L. Ed. 599.

[6] *Sutherland* v. *Bank* (1880) 78 Ky. 250.

[7] *Harris* v. *Balk* (1904) 198 U. S. 215.

[8] *Goodwin* v. *Claytor* (1905) 137 N. C. 224, 231, 49 S. E. 173.

[9] *Harris* v. *Balk* (1904) 198 U. S. 215, reversing *Balk* v. *Harris* (1902) 130 N. C. 381, 41 S. E. 940.

When shares of corporate stock are sought to be attached, a question arises as to the situs of such stock. The common law rule, supported by a great majority of state decisions, is stated as follows: "Corporate stock, for the purpose of attachment, has its situs where the corporation is located, and shares of stock in a foreign corporation cannot be attached, even though the corporation is carrying on business within the state. Capital stock of a domestic corporation is subject to attachment, although it is owned by a non-resident, or although the certificate of stock is in the possession of a debtor outside the state."[10] "Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. . . . For purposes of attachment under the usual statute, stock is located where the corporation is incorporated. . . . The shares owned by a non-resident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment. . . ."[11]

Under the modern view, expressed in the Uniform Stock Transfer Act, shares of stock have a situs wherever the stock certificates are found. Stock certificates acquire the character of negotiable instruments, requiring a transfer of the certificate in order to change ownership. The Stock Transfer Act provides that no levy or attachment of stock shall be good until the certificate is seized or its transfer by the holder is enjoined. This view has been developing under modern business conditions, and the certificates are looked upon as the stock itself.[12]

In most jurisdictions today, stock may be attached where the certificates are found or else at the domicile of the corporation. But in the principal case, neither of these conditions were present. The garnishee was a foreign corporation, and no certificates of stock in that corporation belonging to the defendant were found in North Carolina.

In North Carolina, as well as in all jurisdiction, attachment is authorized against the property of the defendant.[13] If there is no property of the defendant within the jurisdiction, an attachment cannot lie. But the North Carolina statute specifically provides that "The rights or shares of the defendant in the stock of any association or corporation, with the interest and profits thereon, and all other

[10] Cook, *Principles of Corporation Law,* pp. 204, 205.

[11] Cook, *Corporations* (8th Ed.) vol. II, p. 1605, sec. 485.

[12] *Simpson* v. *Jersey City Co.* (1900) 165 N. Y. 193; *Bellows Falls Power Co.* v. *Commonwealth* (Mass 1915) 109 N. E. 891.

[13] C. S., sec. 798.

property in this state of the defendant, are liable to be attached, levied on and sold to satisfy the judgment and execution."[14] In the principal case, the court held that this section of the statute means clearly what it says and therefore the shares of the defendant in the stock of the American Railways Express Company are subject to attachment. But it may be pointed out that this section also says "all other property in this state of the defendant," clearly making the situs of property in North Carolina a prerequisite to attachment.

In *Evans* v. *Monot*,[15] the nature of a share of stock is discussed as follows: "A share of stock of the corporation is a thing incorporeal—a mere right—which entitles its owner to participate in the general management of the concerns of the corporation by being a member; in the meetings of the stockholders to elect officers and do other acts of the kind, to demand and receive from the corporation a dividend of profits, whenever dividends are declared, and to demand and receive a portion of whatever may be on hand at the dissolution." That a stockholder is not an owner of corporate property is common learning. So it becomes difficult to understand the conclusion of the Court in the principal case, that ". . . the American Railway Express Company, though incorporated in Delaware, was doing business in this state and subject to its jurisdiction. The shares of stock held by the defendant in that company was an obligation of the company doing business here due to its stockholder. It was the 'property of the stockholder in the hands of the company doing business here.' Whether it be treated as a liability or obligation of the company issuing the stock, or as an interest which the defendant owns in that company and its assets here, it was the 'property' of the defendant, and in either event it was subject to payment of the debts of the defendant stockholder."[16]

But it is submitted that while the shares of stock owned by the defendant in the foreign corporation are his property, there is no possible way to sustain the result that such shares are property in North Carolina without disregarding the corporate entity. The foreign corporation owned property in North Carolina consisting of equipment, trucks, franchises, etc. It seems to be going too far to say that the defendant shareholder owned any property in the State. However this view of the shareholder's interest in corporate property

[14] C. S., sec. 816.

[15] *Evans* v. *Monot* (1859) 57 N. C. 227.

[16] *Parks* v. *Express Co.* (1923) 185 N. C. 428, 117 S. E. 507.

is sustained in a more recent case,[17] discussed in the following note, where the Supreme Court upheld an inheritance tax on stock in a foreign corporation owned by a non-resident decedent.

B. S. G.

INHERITANCE TAX ON STOCK OWNED BY NON-RESIDENT IN FOREIGN CORPORATION—In a recent case,[1] a resident of the State of Rhode Island died owning shares of stock in the R. J. Reynolds Tobacco Company which has its principal places of business in this State, and two-thirds of the total value of its tangible property is located herein. The Corporation maintains a stock transfer office in New York City, and the paper certificates representing the shares of stock owned by the deceased at the time of his death have never been in this state. None of the beneficiaries under the will lived in North Carolina. It was held that these shares of stock were subject to the North Carolina inheritance tax.

The question faced by the court is: Can North Carolina levy an inheritance tax upon shares of stock owned by a non-resident decedent in a foreign corporation doing business in this State? Or in the words of Justice Stacy: "The question, therefore, directly presented is whether the Legislature of this State can impose an inheritance or a transfer tax upon the right of non-resident legatees or distributees to take by will or receive under the interstate laws of another state from a non-resident testator or intestate, shares of stock in the R. J. Reynolds Tobacco Company and to require the payment of such a tax as a condition precedent to the right to have said stock transferred on the books of the corporation."[2]

The Supreme Court held that the Legislature had the power to impose such a tax. Chief Justice Clark filed a vigorous dissenting opinion in which he contended that such a tax was unconstitutional.

The decision seems entirely consistent with the adopted policy of the Supreme Court of North Carolina concerning the nature of a shareholder's interest in corporate property. This is illustrated by the discussion in the preceding note concerning the attachment of stock in foreign corporations.

North Carolina levies a capital stock tax on domestic corporations[3] and, since 1921, exempts from taxation in the hands of the

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[17] *Trust Co.* v. *Doughton* (1924) 187 N. C. 263, 121 S. E. 741.

[1] *Rhode Island Hospital Trust Co.* v. *Doughton* (1924) 187 N. C. 263, 121 S. E. 741.

[2] 187 N. C. 263, 265.

[3] C. S., sec. 7771.

individual stockholder shares of stock in corporations which have already paid a capital stock tax.[4] This policy is based on expediency and economy in the collection of taxes, through the corporation itself or "at its source," rather than in the hands of the owner. The statute in 1921 was designed to prevent double taxation, the state choosing to collect annual property taxes on shares of stock at their source and exempting them in the hands of the owner.

Under this doctrine North Carolina could not have laid an annual property tax on the shares in the present case, because the stock was owned in a foreign corporation and the owner was a non-resident. In other words, North Carolina could not collect at source by means of a capital stock tax since this was not a North Carolina corporation.

Since North Carolina could not have levied an annual property tax on these shares of stock, could it impose an inheritance tax upon their transfer under the facts of this case? The answer to this question depends on whether any property was transferred under the laws of North Carolina. An inheritance tax is not a property tax, but a tax on the privilege granted by the state of taking by inheritance or will. It is fundamental that under the Fourteenth Amendment, a state has jurisdiction to impose an inheritance tax only when the exercise of some essential privilege incident to transfer of title to the property in question depends for legality on the law of that state. This principle renders the tax in the present case invalid because no property was transferred in North Carolina or under North Carolina law. The property in North Carolina did not belong to the shareholder but to the corporation. "The corporation owned it prior to the shareholder's death; it continues to hold it after his death. No succession takes place in North Carolina and there is nothing upon which to impose an inheritance tax. What the shareholder owned was a membership in the corporation, a right to his proportion of the dividends declared if any, and a right to his proportion of the assets remaining after paying debts if the business is discontinued. The corporation and the shareholder are separate and distinct."[5]

"Since the property belongs to the corporation, not to the shareholder or his successor, both before and after the shareholder's

[4] Pub. Laws, 1921, Ch. 34, sec. 4. *Person* v. *Watts* (1922) 184 N. C. 499, 115 S. E. 336. *Taxation of Stock in North Carolina Corporations* by Walter J. Matherly, 1 N. C. Law Rev. 203.

[5] See note, *Corporate Stock and Inheritance Taxation,* 23 Mich. Law Rev. 272, 273.

death, and only the intangible interest in the corporation represented by the shares has changed hands, no transfer has taken place which depends for its validity in any way upon the laws of the state in which the property lies (North Carolina in the present case), and there is consequently no jurisdiction to tax. The courts have, therefore, almost unanimously frustrated these attempts to levy tribute, declaring either that the statute in question did not sufficiently manifest any such covetous intention on the part of the legislature or that, if it did, it was so shamefaced a tearing of the corporate veil as to be unconstitutional."[6]

There is no doubt in the present case but that the legislature intended to levy the tax in question.[7] The decision is based on the theory that the decedent shareholder owned property in North Carolina which passed under the laws of this state. That the court proceeded on this theory appears from the following quotation, which is paraphrased from the language of the court in *Parks* v. *Express Co.*[8] (discussed in the preceding note): "In the present case the R. J. Reynolds Tobacco Company though incorporated in New Jersey is doing business in this State and is subject to its jurisdiction. The shares of stock held by the decedent at the time of his death in that company was an obligation of the company to its stockholder. It was the property of the stockholder in the hands of the company doing business here." But it is submitted that the property in North Carolina belonged to the corporation and not to the shareholder, and therefore no property passed under the laws of this state.

The issue presented has not been passed on yet by the Supreme Court of the United States, but the great weight of state authority is against the Court's opinion and in accord with the dissenting opinion in *Trust Co.* v. *Doughton*,[9] on the theory that no property passed in North Carolina and therefore the state has no jurisdiction to levy an inheritance tax.[10]

C. C. P.

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[6] *Jurisdiction to Tax Shares of Stock*, 38 Harv. Law Rev. 811.

[7] C. S., sec. 7772.

[8] *Parks* v. *Express Co.* (1923) 185 N. C. 428, 117 S. E. 505.

[9] *Trust Co.* v. *Doughton* (1924) 187 N. C. 263, 121 S. E. 741.

[10] *Tyler* v. *Dane County*, (1923—Mich.) 289 Fed. 843; *State* v. *Dunlap*, (1916) 28 Idaho 784, 156 Pac. 1141; *People* v. *Dennett* (1916) 276 Ill. 43, 114 N. E. 493; *Welch* v. *Treasurer and Receiver General* (1916) 223 Mass 8, 111 N. E. 774; *State* v. *Walker* (1924—Montana) 226 Pac. 894; *In Re McMullen's Estate* (1923) 236 N. Y. 518, 142 N. E. 266; *Shepard* v. *State* (1924—Wis.) 197 N. W. 344. See discussions in following notes: 35 Harv. Law Rev. 93; 38 Harv. Law Rev. 291 and 809; 23 Mich. Law Rev. 272.

LIABILITY OF INFANT FOR INDUCING CONTRACT BY MISREPRESENTATION AS TO AGE—Some very interesting problems in the law of infant's contracts are presented in the case of *Greensboro Morris Plan Co. et al.* v. *Palmer.*[1] The case involved a suit to recover damages for false representation and deceit. The defendant, aged nineteen, emancipated and married, misrepresented to the plaintiffs that he was of full age, as his mature appearance might indicate. He thus induced them to sell him an automobile truck for about $3,000.00, to secure which he executed his note and chattel mortgage on the truck. He paid to the plaintiffs approximately $2,000.00, of which $1,200.00 had been made from the use of the truck. The plaintiffs, in claim and delivery proceedings, seized the truck, which sold for $700.00.

These facts being alleged by plaintiffs, the defendant moved for judgment on the pleadings. The court held that the plaintiffs could not recover either on the contract or in tort and that the defendant is entitled to recover the sums which he paid to the plaintiffs with interest.

The above case is one of many similar cases, apparently increasing in number, which are occupying the attention of the courts today. To reconcile the law as laid down in the different jurisdictions is impossible. This discussion is necessarily limited to infant's contracts in relation to personal property, and will be dealt with under the following topics:

1. Disaffirmance and return of consideration.
2. Estoppel as basis of infant's liability on contract.
3. Liability of infant in action of deceit.

I. DISAFFIRMANCE AND RETURN OF CONSIDERATION—The rule as laid down in the case referred to above is, that concerning personal property, and excluding contracts for necessaries[2] and such contracts as a minor is authorized by statute to make,[3] an infant may, during his minority,[4] avoid his contracts, and such avoidance when effected, is irrevocable and renders the contract null and void *ab initio*.[5] This doctrine is in accord with the general rule of modern

[1] *Greensboro Morris Plan Co. et al.* v. *Palmer et al.* (1923) 185 N. C. 109, 116 S. E. 121. See also *Hight* v. *Harris* (1924) 188 N. C. 329, 124 S. E. 623.

[2] *Jordan* v. *Coeffields* (1872) 70 N. C. 110.

[3] C. S., sec. 994 (conveyance by infant trustee).

[4] *Pippin* v. *Insurance Co.* (1902) 130 N. C. 23, 40 S. E. 822.

[5] *Pippin* v. *Insurance Co., supra.*

law in effect in the majority of American jurisdictions, the later decisions of the American courts having departed from the law as laid down in the early cases where the contracts of an infant were classed as void, voidable and binding, depending upon whether or not they were beneficial or prejudicial to the best interests of the infant.[6] The modern rule seems to offer fully as much protection to the infant as did the old doctrine for he has a legal right to disaffirm his contracts, and his motive for doing so is not a proper subject of inquiry.[7] However, an attempt on the part of the infant to rescind his agreement in part is not effective. If he is going to assert his legal right at all, it must apply to the whole contract.[8] The contracts of an infant are said to be voidable, a North Carolina case defining this to mean incapable of being enforced at law by the adult party if the infant pleads his infancy.[9] The contract is, however, capable of being ratified by the infant when he attains his majority.[10] The general rule, which includes the rule stated above, is that "voidable" as applied to an infant's acts is taken to mean a valid act which may be avoided, rather than an invalid act which may be confirmed.[11] In other words, the contrct is valid until the infant, by pleading his infancy, uses the proverbial shield given him by the law on the theory that until he attains the age of twenty-one years, his judgment is not so matured that he may be depended upon to act for his best interests; nor is he able to protect himself from those who may be too clever for him and would persuade him to act to his own detriment. Thus the law has given the infant a defense to what would otherwise be a perfectly valid contract enforceable at law. Therefore, the deed of an infant is universally agreed to transfer a title though that title is voidable.[12] Accordingly the deed or mortgage of a infant, since they are voidable only and not void, hold good until some act is done to disaffirm them, but an infant who has executed a deed of land cannot

[6] 31 Corpus Juris 1060.

[7] *Forsee's Adm'x.* v. *Forsee* (1911) 144 Ky. 169, 137 S. W. 836.

[8] *Roeder* v. *Simonson et al.* (1923) 180 Wis. 155, 192 N. W. 477.

[9] *Skinner* v. *Maxwell* (1871) 66 N. C. 45.

[10] *Ward* v. *Anderson* (1892) 111 N. C. 115, 15 S. E. 933.

[11] Williston, *Contracts,* Vol. 1, sec. 231.

[12] *Baggett* v. *Jackson* (1912) 160 N. C. 26, 76 S. E. 86. Also the indorsement of negotiable paper by an infant payee or indorsee transfers title, and therefore the infancy of the indorser is no defence to an action by the holder against the maker. C. S., sec. 3012 (N. I. L.). *Nightingale* v. *Withington* (1818) 15 Mass. 272, 8 Am. Dec. 101.

make the deed absolutely void or valid by any act of his own before attaining majority.[13]

The acts by which a minor may avoid his contracts differ and depend upon the circumstances of the particular case. Any action on his part which clearly shows an intent to disaffirm the contract is sufficient to do so.[14] For instance, where the infant brought suit for the purpose of rescinding his contract and it was alleged in the complaint that the plaintiff, at the date of his contract with the defendant, was a minor, and the defendant did not deny the allegation, the court held that the prayer in the complaint disaffirmed the contract.[15] On the same principle, a sale or purchase of personal property may be revoked by demanding back or surrendering the property.[16] An offer by an infant to return a horse which he had purchased was held sufficient to rescind the trade although the offer was refused. The rescission was complete without an actual tender of the property.[17] Also notice by an infant of his disaffirmance of a contract with a partnership is sufficient if this notice is given to one of the partners.[18] The disaffirmance may also take place when an infant is sued on a contract. By making the plea of infancy, the infant shows his intention to rescind, which prevents a recovery on the part of the plaintiff. But an infant may rescind at other times than when he is sued on a contract. He may disaffirm at any time during his minority.[19] The fact that the law in regard to the avoidance of contracts, pertaining to personal property is different from the law in regard to real property, is probably to be accounted for by the transient nature of personal property, by the ability of the parties to transfer certain kinds of personal property from place to place and by the fact that if an infant were not allowed to rescind such a contract until he became of age, so far as practical results are concerned, this would be equivalent to removing altogether his right to disaffirm.

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[13] *McCormick* v. *Leggett* (1861) 53 N. C. 425. In case of grants of land, the effect of disaffirmance is to suspend the matter until the infant becomes of age.

[14] 31 C. J. 1068.

[15] *Skinner* v. *Maxwell, supra,* note 9.

[16] 14 R. C. L. 237.

[17] *Bombardier* v. *Goodrich* (1920) 94 Vt. 208, 110 Atl. 11.

[18] *Spenser* v. *Collins* (1909) 156 Cal. 298, 104 Pac. 320.

[19] Note 4, *supra.* As to reasonable time for disaffirmance after majority, see *Weeks* v. *Wilkins* (1904) 134 N. C. 522, 47 S. E. 24; *Faircloth* v. *Johnson* (1925) 189 N. C. 429, 127 S. E. 346.

In taking up the subject of the return of consideration, several conditions have been assumed which cover the majority of cases in regard to this matter and state the general rules now applying. The law on this question is so complicated that it would be impracticable to go into details in a note of this length. The above rule which states that any act on the part of the infant which clearly shows an intent to disaffirm is sufficient, seems to warrant the inference that a tender by the infant to the other party of the consideration received from him is not a condition precedent to disaffirmance. Therefore, the right of the infant to rescind his contract, his right to recover any consideration that may have passed from him and his obligation to return the consideration that he has received are three separate and distinct propositions though in most cases, for practical purposes, they are taken as one. If an infant has entered into a contract with an adult whereby each party received consideration and later he disaffirms the contract, the disaffirmance, when effective, renders the contract void *ab initio* and thereby restores the specific consideration, or any part of it that remains in the hands of the infant, to the person from whom it was obtained.[20] That is, the infant cannot disaffirm without vesting a right in the other party to recover the consideration. Some jurisdictions leave upon each party the burden of demanding that which he has parted with.[21] Others, presumably to prevent any increase in litigation, require the infant to offer as a condition of disaffirmance, so much of the consideration as is still in his possession.[22] Suppose that the infant avoids and attempts to retain the consideration. "His right to avoid cannot be questioned, but he cannot retain the property purchased and at the same time repudiate the contract under which he received it; and if he does repudiate the contract under such circumstances, the title remains in the vendor and he is entitled to the immediate possession of the property. Such a refusal to give up the consideration is a wrongful conversion."[23]

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[20] Note 9, *supra*.

[21] *Millsaps* v. *Estes* (1905) 137 N. C. 536, 50 S. E. 227. This seems the more logical rule.

[22] Williston, *Contracts*, Vol. 1, sec. 19; *Reynolds* v. *Garber Buick Co.* (1914) 183 Mich. 157, 149 N. W. 985; *Jones* v. *Valentines School of Telegraphy* (1904) 122 Wis. 318, 99 N. W. 1043. An infant cannot repudiate his contract and invoke judicial remedies to restore him to his former position, until he shall have, so far as he reasonably can, made or offered to make restitution. This rule, however, does not prevent an infant from disaffirming his contract where he has parted with the consideration and cannot make restitution, *Barr* v. *Packard Motor Co.* (1912) 172 Mich. 299, 137 N. W. 697.

[23] *Bennett* v. *McLaughlin*, 13 Ill. App. 349.

The infant is liable in trover or replevin for the return of the goods,[24] and he has the same right to recover the specific res transferred by him to the other party, if it is still in existence.[25] If the other party has transferred it, the infant's right still exists even against a bona fide purchaser.[26] If the consideration consisted of money, and is therefore not traceable, or if the res no longer exists in specie, he can sue the transferee in quasi-contract for the value thereof.[27] However, if the infant no longer has possession of the goods, the vendor cannot maintain replevin and recover a money verdict for the goods,[28] for the reason that this would be contrary to the rule that if an infant has spent, consumed, wasted or destroyed the consideration that he received under a contract, he may disaffirm his contract and recover the consideration that passed from him without restoring any equivalent for that which he received.[29] Thus where an infant purchased a horse and wagon and gave a promissory note in part payment, in a suit on the note he was allowed to recover the money that he had paid to the vendor although he had sold the horse and wagon. "To say that he (the minor) shall not have the protection by disaffirmance, with which the law seeks to guard him, unless he has sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion."[30] The doctrine of requiring the infant to return the specific consideration is extended in some jurisdictions so that it may include not only the specific property received by the infant, but if he has exchanged it for other property of value, which, or a part of which, he still has, the latter may take the place of the original and come under the same obligation.[31] "The same reason that impresses the original impresses the substitute. No question of imprudence or immature folly is in-

[24] 57 L. R. A. 683, note.

[25] *Tipton* v. *Tipton* (1850) 48 N. C. 552.

[26] In regard to the sale of goods, *Downing* v. *Stone* (1891) 47 Mo. App. 144; as to land, *Jackson* v. *Beard* (1913) 162 N. C. 105, 78 S. E. 6. This rule as applied to personal property has been changed in those states which have adopted the Uniform Sales Act.

[27] Anson, *Contracts,* p. 192; *Waugh* v. *Emerson* (1885) 79 Ala. 295.

[28] *Kay* v. *Haupt* (1917) 63 Pa. Sup. Ct. 16.

[29] 14 R. C. L. 238; *Utterstrom* v. *Kidder* (Me.—1924) 124 Atl. 725.

[30] *Carpenter* v. *McGuckian* (1920) 43 R. I. 94, 110 A. 402.

[31] *McGreal* v. *Taylor* (1897) 167 U. S. 688, 42 L. Ed. 326; *Chandler* v. *Jones et al.* (1916) 172 N. C. 569, 90 S. E. 580 discusses the application of this rule to real property.

volved. It carries out precisely the same principle of fair dealing as the required restitution of the specific property."[32]

If a minor purchases some article of personal property, such as an automobile or truck, and uses it for some time it seems unreasonable to allow him to disaffirm without making any allowance whatever for the decrease in the value of the property, yet the rule has been generally declared to be that an infant, on disaffirming his purchase of personal property returned or tendered back by him, may recover what he has paid therefor without deduction for the use or depreciation in the value of the property.[33] However, the law is divided on this question. It has been held that where the depreciation in value exceeded the amount paid in by the infant, he is not entitled to recover.[34] Also, an infant rescinding the purchase of a bicycle and claiming a return of the installments paid upon it must account for the use of the wheel and the deterioration in value while in his possession.[35] These cases seem to rest on the principle that an infant should be held liable for any benefits that he has received by the use of the property. They cannot be said to assert the doctrine that an infant may make a provident contract to purchase that which is not a necessary. In a New Hampshire case, an infant who had purchased an automobile was allowed to rescind the contract and recover the money he had paid toward the purchase price by returning the car and (1) accounting for any benefit he had received from its use, and (2) paying any damage to the car that was caused by his tortious acts, but not those caused by his ignorance or unskilfulness in operating the car.[36] In a Minnesota case where the contract was found by the jury to be a reasonable and provident one, the minor was held liable for benefits.[37] In a Texas case, a minor was held not liable for depreciation unless on the ground of tort.[38]

The North Carolina Court, in the principal case, adhering to the majority rule, allowed the infant to recover all of the consideration

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[32] *Whitman* v. *Allen* (1923) 123 Me. 1, 121 A. 160.

[33] *Greensboro Morris Plan Co. et al.* v. *Palmer et al.*, note 1, *supra; Utterstrom* v. *Kidder,* note 30, *supra;* also *Creer* v. *Active Automobile Exchange, Inc.* (Me.—1923) 121 A. 888; *Hauser* v. *Marmon Chicago Co.* (1917) 208 Ill. App. 171. 11 L. R. A. 491, note, gives this as the majority rule.

[34] *Spandora* v. *Staten Island Garage* (1922) 193 N. Y. S. 392.

[35] *Rice* v. *Butler* (1899) 160 N. Y. 275, 55 N. E. 275. Indiana and Oregon are in accord—see 11 L. R. A. 494, n.

[36] *Lavoie* v. *Woolridge* (1918) 79 N. H. 21, 104 A. 346.

[37] *Berglund* v. *American Multigraph Sales Co.* (1916) 135 Minn. 67, 160 N. W. 191.

[38] *Mast* v. *Strahan* (Tex.—1922) 255 S. W. 790.

he had paid, although it was shown that about three-fifths of it had been earned from the use of the truck. Not only was the infant not obliged to account for the benefits received from the use of the truck, but he was not charged with any amount to represent the fair rental value of the truck while used in carrying on his lumber business. Furthermore the infant was not liable in any way for deterioration or depreciation in value of the truck, although it was sold for less than one-fourth of its original cost.

W. H. A.

II. Estoppel as Basis of Infant's Liability on Contract—The question of estoppel did not arise in the *Greensboro Morris Plan Case,*[39] but it has occurred with such frequency in similar cases in other jurisdictions that a short discussion in connection with the other phases of the case is deemed necessary.

Lord Coke says the name estoppel was given because a man's own act "stoppeth up his mouth to allege or plead the truth."[40] Since the cases under consideration involve only equitable estoppel or estoppel *in pais,* it is unnecessary to go into the various other kinds. Equitable estoppels are estoppels which "prevent a party from asserting his rights under a general technical rule of law, where he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."[41] "The principle of estoppel is sometimes spoken of as a rule of evidence. But it is not such; estoppels differ from evidence in this, that the former are received as conclusive and preclude all inquiry into the merits of the title, while evidence is merely the medium of establishing facts which do exist or have existed."[42]

It can be said in general that the doctrine of estoppel does not apply to an infant even though he is capable of exercising discretion.[43] However, there are cases that are exceptions to this rule, or deny its application where the conduct of the infant, on which the estoppel is sought to be based, was intentional and fraudulent, and the infant, at the time, had reached an age when he is capable of

[39] See note 1, *supra.*

[40] *Martin* v. *Maine Cent. R. Co.* (1890) 83 Me. 100, 21 Atl. 740.

[41] *Hallowell Nat'l Bk.* v. *Marston* (1893) 85 Me. 488, 27 Atl. 529

[42] 21 C. J. 1060.

[43] *Miller* v. *St. Louis R. Co.* (1915) 188 Mo. A. 402, 174 S. W. 166.

exercising discretion.[44] In some cases where, in addition, benefits have been appropriated to his advantage, a form of equitable estoppel also arises.[45]

For an estoppel to arise against an infant, all the elements of estoppel must be present. The conduct of the infant must be fraudulent and misleading, and it must have been believed, relied on, and acted upon by the other party.

As a general rule, the doctrine of estoppel not being applicable to infants in so far as voidable transactions are concerned, the courts are in no haste to hold that the acts of an infant create an estoppel against him to disaffirm his acts or transactions where the facts are at all consistent with a contrary opinion.[46] Clearly, if he cannot be estopped himself, neither will the acts or admissions of other persons estop him.[47] Some authorities, however, which maintain this doctrine assert the right of estoppel against him, where, by his conduct he has led others to act to their prejudice in dealing with persons other than himself, and it is generally held that if an infant has reached years of discretion and wilfully and intentionally conducts himself so that the other party in good faith relied upon his conduct to his detriment, he may be estopped from avoiding his acts or transactions, at least unless he returns the consideration.[48]

On the question as to what effect a false statement as to age has upon a voidable transaction, where the other party to the transaction relies thereon, there is a conflict. In the jurisdictions representing the weight of authority, it is held that the fact that an infant falsely represented himself to be of age to the one with whom he dealt does not estop him from disaffirming the contract and setting up the defense of infancy against the enforcement thereunder.[49] In

[44] *Harmon* v. *Smith* (1889) 38 Fed. 482; *Lewis* v. *Van Cleve* (1922) 302 Ill. 413, 134 N. E. 804.

[45] *Fowler* v. *Ala. Iron and Steel Co.* (1910) 164 Ala. 414, 51 So. 393; *Marx et al.* v. *Clisby et al.* (1901) 130 Ala. 502, 30 So. 517.

[46] *Sanger* v. *Hibbard* (1900) 104 Fed. 455; *Dohms* v. *Mann* (1888) 76 Iowa 723, 39 N. W. 823; *George et al.* v. *Delaney* (1904) 111 La. 760, 35 So. 894.

[47] *Clark* v. *Goddard* (1863) 39 Ala. 164, 84 A. D. 777; *Missouri Central Bldg. and Loan Ass'n* v. *Eveler et al.* (1911) 237 Mo. 679, 141 S. W. 877, Ann. Cas. 1913 A. 486.

[48] *Smith* v. *Cole* (1912) 148 Ky. 138, 146 S. W. 30.

[49] U. S. *Burdett* v. *Williams* (1887) 30 Fed. 697.
Ark. *Tolin* v. *Spann* (1908) 85 Ark. 556, 109 S. W. 534, 16 L. N. S. 1672.
Conn. *Geer* v. *Hovey* (1790) 1 Root 179.
Ga. *McKamy* v. *Cooper* (1888) 81 Ga. 679, 8 S. E. 812.
Ind. *Price* v. *Jennings* (1877) 62 Ind. 111.
Mass. *Merriam* v. *Cunningham* (1853) 11 Cush. 40.

other jurisdictions, such false representations may give rise to an estoppel.[50] All elements of estoppel must be present, and the other party to the transaction must act in good faith especially if the situation and appearance of the alleged infant at the time were such as tended to substantiate the statement as to his full age.

The former jurisdictions have the weight of authority with them, but the latter seem to have the better reasoning. A few well-considered cases on both sides will illustrate this point.

The New York court held that if an allegation that the infant represented that he was of full age "were even permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail upon the infant to make a declaration which might be shown as evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefitted by it."[51]

Merriam v. *Cunningham* held that "the fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or in any way enhance its obligation. . . . The doctrine contended for by the plaintiff would effectually deprive infants of that protection which the law sedulously seeks to afford them in their dealings."[52]

It seems logical that an infant who has the appearance of an adult; who fraudulently misrepresents his age; and who is intelligent enough to appreciate the fraud, and set up his infancy, should

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Minn. *Folds* v. *Allardt* (1886) 35 Minn. 488, 29 N. W. 201.
N. H. *Burley* v. *Russell* (1839) 10 N. H. 184, 34 A. D. 146.
N. Y. *Conroe* v. *Birsall* (1799) 1 Johns. Cas. 127, 1 A. D. 105.
N. C. *Carolina Interstate Bldg. and Loan Asso.* v. *Black* (1896) 119 N. C. 323, 25 S. E. 975.
Penn. *Frank Spangler Co.* v. *Haupt*, 53 Pa. Super. 545.
S. C. *Norris* v. *Vance* (1846) 37 S. C. L. (3 Rich.) 164.
Vt. *Whitcomb* v. *Joslyn* (1878) 51 Vt. 79, 31 Am. Rep. 678.
Eng. *Lesley* v. *Sheill* (1914) 3 K. B. 607, 6 B. R. C. 738.

[50] Ky. *Looney* v. *Elkhorn Land Co.* (1922) 242 S. W. 27.
La. *Guidry* v. *Davis*, 6 La. Ann. 90.
Miss. *Commander* v. *Brazil* (1906) 88 Miss. 668, 41 So. 497, 9 L. N. S. 1117.
Neb. *Klinck* v. *Reeder* (1921) 107 Neb. 342, 185 N. W. 1000.
N. J. *La Rosa v. Nichols* (1918) 92 N. J. L. 375, 105 Atl. 201, 6 A. L. R. 412.
Texas *Kilgore* v. *Jordan*, 17 Tex. 341.
Australia. *Campbell* v. *Ridgley*, 13 Vict. L. 701.

[51] *Conroe* v. *Birdsall* (1799) 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.

[52] *Merriam* v. *Cunningham* (1853) 11 Cush. (Mass.) 40.

be liable on an action of contract. Lord Mansfield remarked with much wisdom that the defense of infancy was given as a shield and not as a sword, and that it should never be turned into an offensive weapon to assist fraud.[53]

Following this line of reasoning, the Louisiana court said, "It is an error to suppose that the law can sanction the perpetration of frauds by minors; the truth and reality of *bona fide* transactions are as binding upon them as upon majors."[54]

In *Klinck* v. *Reeder*,[55] it was held that a minor, doing business in his own name and fradulently misrepresenting himself to be of age, and giving notes in payment for a tractor used in his business, was not permitted to defeat a recovery on the notes because of his infancy. The court, in that case, said, "While generally the doctrine of estoppel *in pais* is not applicable to infants, yet where an infant of so mature an age and appearance as makes his statement of being of age plausible, while actually transacting business for himself, makes fraudulent and false representations that he is of age to another for the purpose of transacting business with him, and such other person believes such statements to be true and relies and acts thereon and parts with his property because thereof, the doctrine of estoppel *in pais* will apply and such infant will not be permitted to set up his minority as a defense to an action to enforce the performance of the contract so entered into."

Another case in accord is *Commander* v. *Brazil*.[56] It was there held that an infant, who, after reaching the stage of maturity indicating that he is of full age, enters into a contract falsely representing himself to be of age and accepts the benefits thereof, is estopped from denying that he is not of age when the contract is sought to be enforced against him; the party dealing with him believing him to be of full age. Justice Calhoon, concurring in the opinion handed down said, "Recoiling from the multitude of undistinguishable distinctions in the books, I take the law to comport with what is plainly right. Infants are shielded from their own improvidence, and their contracts as to them, are of no force except for necessities. But when a minor whose appearance justifies belief in such, induced a contract, which is reasonable, by false assurance that he is of the

[53] *Zouch* v. *Parsons* (1765) 3 Burr. 1794, 97 Eng. Reprint 1103.

[54] *Guidry* v. *Davis*, 6 La. Ann. 90.

[55] *Klinck* v. *Reeder* (1921) 107 Neb. 342, 185 N. W. 1000.

[56] *Commander* v. *Brazil* (1906) 88 Miss. 668, 41 So. 497, 9 L. N. S. 1117.

age of majority, he should be, and is compellable to carry it out, or to fully restore the *status quo* by returning that which he has received and making compensation if he has wasted it."

In four of the states of the union, statutes have been passed (that of Iowa being the original) providing, in identical language, that an infant cannot disaffirm his contracts in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party has good reason to believe him (the minor) capable of contracting.[57]

Mere failure to give notice of the fact of infancy without any misrepresentations upon the subject or any intent to defraud has been held insufficient to create an estoppel, although the infant appeared to be of age, and was believed by the other party to be so.[58] However, there is authority to the effect that if the infant has arrived at years of discretion and under the circumstances of the case it was his duty to disclose his minority, he may be estopped by his failure to do so.[59]

Although the above cases are in the minority and do not represent the North Carolina view, yet the principles involved seem to be correct and the conclusions desirable. To adopt this view is not to take away the infant's power to disaffirm his contracts generally. It means that in a limited field of cases, and only then when certain facts are present, will the infant be bound by his contracts. The doctrine by which this is accomplished is equitable estoppel.

H. A. B.

III. Liability of Infant in Action of Deceit—We have seen that infants have always occupied a favored place in the common law. At first, infants were subject to no liability for their torts, except those that were wilful and opposed to the public peace. This indulgence, however, was ere long taken away, with the result that, by unquestioned authority in all common law jurisdictions, infants are now held for all their torts which are not connected with contract—"pure torts" or "torts *simpliciter*"—on an equal basis with adults,

[57] Iowa Code, sec. 3190; Kan. Gen. St. sec. 4184; Utah Rev. St., sec. 1543; Wash. Gen. St., sec. 4532.

[58] *Grauman, Marx and Cline Co.* v. *Kreinitz* (1910) 142 Wis. 556, 126 N. W. 50.

[59] *Bank of Oakwood* v. *Edwards* (Texas, 1922) 245 S. W. 478.

no distinction being made between infants and adults in that respect.[60]

But it has always been the established policy of the common law to protect infants in the use of their property; and since by lack of mature business sense an infant may often be induced to make a contract that would be clearly against his interests, the law makes the contracts of infants voidable, and gives them the privilege of disaffirming such contracts, either before or after the attainment of majority.[61] Such avoidance renders the contract null and void *ab initio,* and the right to disaffirm may be exercised at the infant's discretion. This principle is today universally recognized, and, with the exception of a few jurisdictions, is not altered by circumstances which would give rise to an estoppel, as discussed in the preceding section.

Each of these principles is in itself simple enough, and in those cases where only one rule is applicable there is no difficulty. But frequently we find cases arising where elements of tort and of contract are involved in the same set of facts. As to these cases the courts are inclined to hold the contract immunity of an infant more inviolable than his tort liability. And accordingly, they all agree that the infant cannot be held in a tort action, if by so doing he is indirectly required to carry out his disaffirmed contract.[62] This rule is simple enough and undisputed, but nevertheless a great conflict of opinion has arisen in regard to its application—a situation which is due chiefly to a disagreement as to when the tort is inseparably connected with the contract.

There are several types of cases in which the application of the rule is relatively simple. For instance, an infant is not held for a false warranty in regard to the nature or quality of goods which he has sold, for in such a case the fraud is clearly a part of the contract itself. The false statement is about the subject matter of the con-

[60] 1 Cooley, *Torts,* page 177; 2 Kent. Com. 241; *Moore* v. *Horne* (1910) 153 N. C. 415, 69 S. E. 409; *Kron* v. *Smith* (1887) 96 N. C. 393, 2 S. E. 533.

[61] 1 Williston, *Contracts,* sec. 226, p. 443; *Pippen* v. *Insurance Co.* (1902) 130 N. C. 23, 40 S. E. 822; *Norwood* v. *Lassiter* (1903) 132 N. C. 56, 43 S. E. 511. An exception is made to the rule in the case of contracts for personal necessities, and contracts permitted by statute.

[62] *Barnes* v. *Harris* (1852) 44 N. C. 15; *Poe* v. *Horne* (1853) 44 N. C. 398; *Collins* v. *Gifford* (1911) 203 N. Y. 465, 96 N. E. 721.

tract, and the person who relies on such a warranty does so at his peril.[63]

Again, when an infant holds property under a contract of bailment and through his ignorance or negligence injures it, he is not liable in tort,[64] for here again the damage to the property arises through a risk incident to the contract of bailment itself, and the other contracting party must consider such loss as one to which he had given his consent. As to whether an infant holding property under a bailment is liable for damage to such property caused by his willful act, there is a conflict in the authorities. In most of the jurisdictions the infant is held accountable for such willful and positive wrongs, notwithstanding the contract, the courts going on the belief that the wrongful act is so separate from the contract itself that the plea of infancy is not applicable.[65] The act in question is held not to be strictly related to the contract or its performance, but clearly outside the bounds of it. However, in at least two jurisdictions we find the courts holding the opposite view, on the ground that it is impossible to enforce a tort liability without taking notice of the contract and that the privilege of disaffirmance cannot be undermined in any such indirect manner.[66]

As to contracts other than bailments—as, for example, to perform work—there are cases which hold, on what seems to be just and logical grounds, that if the infant is negligent in the manner in which he performs his contract he should not be held accountable for losses resulting from his carelessness, for the wrong is clearly inseparable from the contract.[67]

The most interesting cases and those in greatest disagreement are those in which we find the infant resorting to fraudulent repre-

[63] *West* v. *Moore* (1842) 14 Vt. 447, 39 Am. Dec. 235; *Collins* v. *Gifford* (1911) 203 N. Y. 465, 96 N. E. 721. *Contra—Word* v. *Vance* (S.C.—1818) 1 Nott. and McC. 197, 9 Am. Dec. 683.

[64] *Stack v. Cavanaugh* (1892) 67 N. H. 149, 30 Atl. 350; *Brunhoelzl* v. *Brandes* (1917) 90 N. J. L. 31, 100 Atl. 163. *Contra—Daggy* v. *Miller* (1917) 180 Iowa 1146, 162 N. W. 854.

[65] The leading case is *Vasse* v. *Smith*, 6 Cranch (U. S.) 226, 3L. Ed. 207, opinion by Marshall, C. J.; *Homer* v. *Thwing*, 3 Pick (Mass.) 492; *Towne* v. *Wiley*, 23 Vt. 355. Here an infant hired a horse to go a certain distance. He returned by a circuitous route nearly double the distance and left the horse out over night so that it died from over-driving and exposure. The infant was held liable, for the reason that he had gone outside the scope of the bailment.

[66] *Schenck* v. *Strong* (1818) 4 N. J. Law 87; *Penrose* v. *Curren* (Pa.—1832) 3 Rawle 351, 24 Am. Dec. 356.

[67] *Lowery* v. *Cate* (1901) 108 Tenn. 54, 64 S. W. 1068; *Caswell* v. *Parker* (1901) 96 N. E. 39, 51 Atl. 238.

sentations in order to induce another to contract with him. Most of the cases involving this point have arisen where the infant either expressly or impliedly represented himself to be of full age and where the other party, relying on the infant's statement, entered into the contract, only to find the infant later failing to perform and setting up the plea of infancy. Of this type of case, *Greensboro Morris Plan Co.* v. *Palmer*[68] is typical. Here again the courts all admit the rule that if the infant cannot be held in an action *ex contractu,* he cannot be required to carry out his contract by the indirect method of resorting to an action sounding in deceit. But the cases disagree on the point whether allowing a tort action would be enforcing his contract. The authorities are in such conflict that it is futile to try to reconcile them. The best we can do is to recognize the two lines of cases and to examine the reasoning upon which each rests. For convenience we will arbitrarily designate as the "English view" that which refuses to hold the infant in tort. The opposite view we will call the "American view," although it shares with the English view a large following in this country.

It seems that the question first definitely presented itself in 1665 in the famous case of *Johnson* v. *Pye,*[69] which has serevd as a guide for all the subsequent cases following the English rule. According to a report of that case,

> "The defendant affirms to the plaintiff that he was of full age, on which the plaintiff lends him money. And he takes his security (a mortgage) when in truth he was only twenty and a half. Then he avoids his security. And a difference was taken between torts and contracts of infants, for though infants will not be bound for contracts, yet they will be bound for torts. But though infants will be bound for actual torts, as trespass, etc., which are *vi et contra pacem,* yet they will not be bound for those which sound in deceit, for if they should be, all the infants in England would be ruined."[70]

This early case has been the basis for numerous later decisions, and now the unquestioned law in England is that the infant who induces a contract by fraudulent statements as to his age is not liable, either in contract or in tort, the reason, as shown, being that a tort action would indirectly enforce the contract.[71]

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[68] See note 1, *supra.*

[69] *Johnson* v. *Pye* (1665) Siderfin Pt. 1, p. 258, 1 Keble 913, 1 Lev. 169.

[70] Siderfin, pt. 1, p. 258. See Keeling, J., in 1 Keble 913, "Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract."

[71] *Price* v. *Hewitt* (1852) 8 Excheq. 146, 17 Jur. 4, 57 L. R. A. 676n.

This view has a large following in the United States, a recent important and often quoted case being *Slayton* v. *Barry*.[72] The Massachusetts court said: "In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract," etc. This is a good statement of the principle ruling in the numerous cases in several jurisdictions, and the principle upon which the *Greensboro Morris Plan Co.* v. *Palmer* is decided.

But though, as we have seen, the English rule met with strong support in this country, there is a very decided contrary view. As early as 1838 the New Hampshire court, in *Fitts* v. *Hall*,[73] expressly repudiated the doctrine of *Johnson* v. *Pye*. Since this case is the fore-runner of practically all the American cases in accord and also because it states clearly the principles upon which these cases go, we again quote at length:

"The next question is, whether this action can be maintained against the defendant for the fraudulent representation that he was of full age, by reason of which the plaintiff was induced to sell him the hats. . . . There is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation whereby another has received damage. But the representation in *Johnson* v. *Pye*, and in the present case, that the defendant was of full age, was not a part of the contract nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it a part and parcel of the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract."

[72] *Slayton* v. *Barry* (1900) 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560. This case is inherently of doubtful soundness, for its supporting cases seem to be distinguishable on their facts. In one of them, *Gilson* v. *Spear* (1865) 38 Vt. 311, 88 Am. Dec. 659, the infant falsely represented that the horse sold the plaintiff was sound. This is clearly a part of the subject matter of the contract. *Doran* v. *Smith* (1877) 49 Vt. 353 apparently follows *Gilson* v. *Spear*. Another, *Nash* v. *Jewett* (1889) 61 Vt. 501, 4 L. R. A. 651, 18 Atl. 47 follows *Gilson* v. *Spear* and *Doran* v. *Smith* and several inapplicable cases. But *Slayton* v. *Barry* is still the law in Massachusetts, being followed by *Raymond* v. *Cycle Co.* 230 Mass. 54, 118 N. E. 359.

[73] *Fitts* v. *Hall* (1838) 9 N. H. 48.

The doctrine of *Fitts* v. *Hall* was accepted as the law in New York in 1843,[74] and, after a period of doubt[75] was in 1863 expressly declared the proper rule in a case which again rejected the English rule as embodied in *Johnson* v. *Pye,* and cited in support of its stand cases from New Hampshire, the United States Supreme Court, Texas, Maine, and South Carolina.[76] Since that time, the doctrine has been adopted in a number of other jurisdictions.[77] The concensus of opinion is that the fraud is not "part and parcel" of the contract, and that to allow the exemption would make the defense of infancy both a shield and a sword, whereas the principles of justice, and the original purpose of the law, require that it should be only a shield of defense.

The objection that to hold the infant for his fraud would be an indirect enforcement of the disaffirmed contract is untenable, for both of the original contracting parties agree that there is no contract. The infant has disaffirmed it, and the plaintiff has waived it. The former contract is now treated as a nullity, and the action is solely upon the fraud. And the amount of the tort liability would not necessarily be the same as the amount of the contract liability. In the two cases, the methods of calculating the damages would be different.[78] In the action in deceit, it is required only that the defendant answer for the actual loss caused by the fraud, and not for the original purchase price nor for the amount unpaid under the contract. The infant might have agreed to pay too much, and in

[74] *Wallace* v. *Morse,* 5 Hill 392.

[75] *Brown* v. *McCune,* 5 Sandf. 222.

[76] *Eckstein* v. *Frank,* 1 Daly 334. This case is expressly followed in *Schuneman* v. *Paradise,* 46 How. Pr. 426.

[77] *Monumental Building Association No. 2* v. *Herman,* 33 Md. 128; *Yeager* v. *Knight* (1883) (obiter) 60 Miss. 730. See also cases cited in Anno. Cases 1913 A, 971, and in 1 Williston 481. For *contra* cases, in accord with *Johnson* v. *Pye,* see 1 Williston 480.

It is uncertain which view has the weight of authority. Cooley says that it is with the English view, 1 Cooley, *Torts,* p. 186. Other writers say it is with the American rule. 57 L. R. A. 676, n; Annotated Cases, 1913 A, 971, n.

In this connection, it is interesting to note that the Civil Law is in accord with the American view. It says that if the infant misrepresents his age, "yet his obligation will nevertheless have the same effect as that of a major." Civil Law 1. Domat., pt. 1, Bk. 4, title 6, sec. 2, par. 2378.

Note also that the Spanish law says on this point: "The law protects those who are defrauded, and not those who commit the fraud." Spanish Law, law 6, title 9, partidas 6th.

[78] *Rice* v. *Boyer* (1886) 108 Indiana 472, 58 Am. Rep. 53, 9 N. E. 420. Stacy, J., in dissenting opinion, *Morris Plan Co.* v. *Palmer,* 185 N. C. 109 at page 120, 116 S. E. 261.

no case would the plaintiff be allowed to make a profit on the transaction. If in a particular case it should happen that the amount of damages recoverable in the tort action equals the amount due on the disaffirmed contract, that would be merely a co-incidence, and as such it should of course have no weight in establishing a general rule. If, as in the *Morris Plan case,* the plaintiff brings his action for damages to the amount unpaid on the contract, through error or otherwise, a court of justice should not hold that fact against his chances for recovery. The jury should be trusted here, as in other cases, to award the amount of damages properly due under the circumstances.

Moreover, there is the fundamental rule of contracts that an agreement procured by fraud is not binding, but is voidable only, at the option of the party defrauded.[79] To allow the plea of infancy to prevail in such a case as *Morris Plan Co. v. Palmer* is to violate this principle. It is not contended that the rule must not have exceptions, but certainly in a case of this kind, where the infant has the discretion of an adult and his appearance and other circumstances are such that a reasonable person is led to believe that he is in fact an adult, as he claims to be, the injured party should not be deprived of his usual remedies. Whether the circumstances of the particular case are such that the plaintiff, as a reasonable person, was justified in relying on them should be considered a question of fact to be determined by a jury. Some of the states have reocgnized the reasonableness of this argument and have removed the possibility of a miscarriage of justice in such cases by passing statutes providing that in cases of this kind the infant cannot escape the consequences of his fraud by resorting to the plea of infancy.[80] When this contention is carried out, either by judicial decision or by statute, no assault is made upon the infant's ancient shield of protection, for in all cases the law requires the other contracting party to exercise good faith and reasonable diligence. If he does not, he is not allowed recovery, and obviously should not be. So the infant is still allowed his "shield of protection" in those cases where he needs it. He is merely disarmed of his sword, which he has no just cause to carry.

It is difficult to see the consistency in requiring an infant to be held for his positive torts, as trespass, trover, etc., and not holding

[79] Clark, *Contracts,* page 234; *Vanguilder* v. *Bullen* (1912) 159 N. C. 291, 74 S. E. 1059.

[80] See note 57, *supra.*

him in cases of the type under discussion. One is inclined to think that such a decision is based too much on sensitiveness to precedent, or supposed precedent. What seems to be the better view is admirably expressed by Judge Stacy in his dissenting opinion:

"I hold it to be a sound principle of law, certainly approved in morals, that an infant who obtains my property by deceit injures me no less than the infant who negligently destroys that which is mine. If he is liable in the latter case, where the heart is free from guilt, why should he not be required to answer in the former, where forsooth his moral turpitude makes the injury more reprehensible on his part, if not more grievous to me? The absence of a contract in the one case and its existence in the other is not a sufficient reason for the difference."[81]

Of course, the professed purpose of the law is to protect the infant in his property and against the wiles of designing persons who would take advantage of his immaturity. Admittedly, the purpose is admirable enough, and the strict rule prevailing in England and North Carolina may have been entirely proper and necessary in the day when it was first promulgated. But reflection reminds us that conditions in England three hundred and more years ago were very different from what they are today. Perhaps at that time persons barely under twenty-one years of age might have needed all the protection allowed by the law. But considering the advances made in education and civilization since that time, it is obvious that the youth of today is much more able to take care of himself in business affairs than an average youth of the same age in that day.[82] The bulk of our college and university students today is made up of persons not yet twenty-one years of age. The rule, therefore, when applied strictly as in the *Morris Plan* case, seem out of date, as well as unfair. While the very soul of the common law is its regard for precedent, at the same time it is manifestly true that the law cannot and does not remain static; it must be capable of making reasonable adjustment to change. In the field of infants' liability, as in other phases of the law, we should recognize that changed conditions call for a new application of well-settled principles.

D. H. D.

[81] 185 N. C. 109, 116 S. E. 177.

[82] It is suggestive to recall that at early common law the age of majority was placed at twenty-five. Later it was reduced to twenty-one.

California has passed a statute, the practical effect of which is to reduce the age of majority to 18 when the question of return of consideration is involved. See *Spenser* v. *Collins,* note 18, *supra.*

NEW PICTURE OF THE UNITED STATES SUPREME COURT

Copyright By Harris and Ewing.

This is the first photograph of the United States Supreme Court to be made since the appointment of Harlan Fiske Stone, former Attorney General, as Associate Justice. The photograph was taken in the studio of Harris and Ewing at Washington, D. C., November 7, 1925. Seated, left to right: Justices James Clark McReynolds, Oliver Wendell Holmes, Chief Justice William Howard Taft, Justice Willis Van DeVanter and Louis Dembitz Brandeis. Standing, left to right: Justices Edward Terry Stanford, George Sutherland, Pierce Butler, and Harlan Fiske Stone.

The
North Carolina
Law Review

Volume Three December, 1925 Number Four

STATUTORY CHANGES IN NORTH CAROLINA LAW IN 1925

The North Carolina General Assembly of 1925 passed many new laws, both public and private. The following comments call attention to some of the laws of general importance then enacted. The LAW REVIEW believes that North Carolina lawyers will be particularly interested. The comments have been written by those members of the editorial staff whose initials appear at the end of their respective contributions. Whenever the abbreviation "Ch" is used alone, it refers to a chapter of the Public Laws of North Carolina—1925. C. S. refers to Consolidated Statutes.

CIVIL PROCEDURE

WHEN CLERK MAY RENDER JUDGMENT—Chapter 16 amends section 597 of Consolidated Statutes, which had been amended by previous statutes, so as to authorize the clerk of the Superior Court to render a judgment by default on any Monday instead of on the first and third Monday. The original statute, Extra Session 1921, ch. 92, ss. 10, 11, authorized the rendition of such judgments only on the first and third Monday of the month; and acts of 1923, ch. 8, amended section 10 to apply to any Monday, leaving section 11 unchanged. This section refers to cases in which a copy of the complaint has been served on the defendant, and attention was called to this difference in volume 1 of the NORTH CAROLINA LAW REVIEW at page 283. The amendment makes the practice uniform in all cases.[1]

SUMMONING WITNESSES AND JURORS—Chapter 98 amends section 918 of Consolidated Statutes by authorizing the officer to serve summons or subpoena on jurors and witnesses by telephone or by registered mail. The statute as printed is not very clearly drawn, but it appears to apply alike to jurors and witnesses. If the process

[1] Vol. 3, Con. Stats., 597, b, c.

is served by telephone, the return shall so state; if served by registered mail, a copy shall be mailed and a written receipt shall be filed with the return as a necessary part thereof. This probably refers to a written receipt given by the postmaster for the registered letter, and not a written receipt signed by the person to whom the letter is sent, showing that he had received it.

Divorce Proceeding—Chapter 93 amends C. S. 1661, by providing that when the cause for divorce is separation for five years, it shall not be necessary to state in the affidavit to the complaint that the grounds for divorce have existed to the knowledge of the plaintiff for six months prior to filing the complaint. The action for divorce may be brought at once, as soon as the five year period has expired.

Certain Funds Exempt from Process for Debt—Under C. S. 677 and 711, all property of the judgment debtor may be reached for satisfaction of a judgment, except such as may be exempt by the Constitution or statutes; and under the attachment and garnishment proceedings,[1] all such property may also be taken before judgment. C. S. 6510, provides that in the case of Fraternal Benefit Societies, no money or other relief furnished by such societies shall be liable to attachment, garnishment, or other process, to pay any debt or liability of a member or beneficiary, "either before or after payment." Chapter 83 extends this exemption so as to apply to any "society or association for the relief of employees, including railroad and other relief associations."

Certain Old Statutes Re-Enacted—Certain statutes were omitted in compiling the Consolidated Statutes, either by oversight, or more probably because they were considered as a part of the common law and sufficiently provided for under the general law and rules of practice.

1. Actions for penalties. When an action is brought for a penalty given by statute and the defendant pleads former judgment, the plaintiff may reply that such former judgment or satisfaction was obtained by collusion or covin. This is the old statute of 4 Hen. VII, c. 20, carried forward in Revised Statutes, ch. 33, s. 105, and in Revised Code, ch. 33, s. 100. It was not brought forward in Battle's Revisal, and appears again in The Code of 1883, s. 932, and in Revisal of 1905, s. 1521.

[1] C. S. 807, 817, 819.

2. Plea of satisfaction. When an action is brought on any single bill or judgment for the payment of money, the defendant may plead satisfaction, in full or in part, by the payment of money or by any other act which was intended as such satisfaction; and when an action is brought on any bond with a condition or defeasance to make it void upon the payment of a smaller sum at a certain time and place, the defendant may plead as satisfaction the payment of money or other act intended as a satisfaction, though not made strictly at the time and place mentioned. This is the old statute of 4 Anne, c. 16, s. 12, carried forward in Rev. Stats, ch. 33, s. 106; Rev. Code, ch. 33, s. 101; omitted in Battle's Revisal; appearing again in The Code, s. 903, and the Revisal, s. 1522.

3. Payment into court as satisfaction. In an action on a bond with a penalty, if the defendant shall bring into court the amount due as principal and interest, with costs expended, it shall be taken as full satisfaction and discharge. This is the statute of 4 Anne, c. 16, s. 13, carried forward in Rev. Stats., ch. 33, s. 107; Rev. Code, ch. 33, s. 102; omitted in Battle's Revisal; and appearing in The Code, s. 934, and in Revisal, s. 1523.

Emergency Judges—The Constitutional provision as to emergency judges had been carried into effect by authorizing judges who had retired from active work in the Supreme Court or in the Superior Court to hold the Superior Courts as emergency judges.[1]

Chapter 216 amends the law as to emergency judges. When the judge assigned to hold any general or special term of the superior court is unable to attend, and no other judge is available, the Governor may appoint, with the advice and consent of the Chief Justice, some person to hold such court. A commission is issued to such appointee for the time designated, and he shall have all the power of a resident or presiding judge of the district, but such power shall extend only to the district or districts for which he is appointed. He may settle cases on appeal and make orders with reference thereto, after the time for which he was appointed expires.

The compensation of such emergency judges is $150 a week and expenses; and no person may be appointed to hold a court in the county in which he resides. The operation of this statute expires on March 1, 1927.

[1] C. S. 1435 (a).

It had been held that an emergency judge did not have jurisdiction to hear a mandamus proceeding at chambers, when not holding a term of court, and this was amended by chapter 8.[2]

Judicial Conference—For the purpose of studying the organization, rules and methods of practice and procedure of the state judicial system, and its practical workings and results, chapter 244 provides for a judicial conference composed of the justices of the Supreme Court, judges of the Superior Court, the attorney-general, and one practicing lawyer from each district. The members are to serve for two years without compensation; the chief justice is the presiding member, the clerk of Supreme Court is secretary, and the Governor appoints to fill vacancies. The conference is to meet twice a year, and to report annually to the Governor, with such recommendations as they may make, and this report is to be submitted to the General Assembly.

A. C. M.

CORPORATIONS

Merger and Consolidation of Corporations—Ch. 77 was enacted by the Legislature as an addition to, rather than an amendment of, Chapter 22 of the Consolidated Statutes. A thirteenth Article is added to the present chapter, the purpose of the Article being to permit consolidation and merger of corporations. The salient points of the Act follow:

Procedure—Section I, 1224-a, permits a merger of any two or more corporations in the State, carrying on any kind of business. The agreement to merge is to be made by a majority of the respective boards of directors of the merging companies, under corporate seals, such agreement to set forth the basis of converting the stock issues of the corporations. The agreement must be submitted to the stockholders of the corporations at a meeting called for the purpose, notice of four weeks publication being called for, in addition to a mailed notification. A majority of stockholders of each corporation must adopt the agreement, which is then signed by the corporate officers and filed with the Secretary of State. A copy of the agreement to merge must be filed with the Clerk of the Superior Court and the Register of Deeds in the county where each corporation has its principal place of business, and also with the Register of Deeds in all counties where the corporations own real property.

[2] C. S. 1435 (b); *Dunn v. Taylor* (1924), 186 N. C. 254, 119 S. E. 495.

STATUS—Section I, 1224-b, provides that the existence of the old corporations shall cease when the agreement to merge is filed, sealed, acknowledged and recorded, as set forth in the preceding subsection. A proviso is attached to protect creditors of the consolidators, keeping alive all liens and debts until the obligations due them are paid, and attaching debts of the merging companies to the new corporation.

STOCKHOLDERS—1224-b goes on to provide for a surrender of the original certificates of stock by respective stockholders of the corporations, and the issue of certificates of the new company in their stead. The issuing company has the right to require indemnity against false issue in the same manner as now provided for in C. S. 1162, covering indemnity in case the corporation is asked to reissue certificates in case of lost or destroyed stock. 1224-c permits a stockholder to appeal to the court for an appraisal of the value of his stock surrendered for new certificates, and provides that any dissenting stockholder, who voted against the merger, can, within twenty days after the filing of the merger agreement, demand to be paid the present value of his stock in cash, instead of participating in the new venture. In case of disagreement as to the value of such stock bought in by the corporation requested to do so, appraisal may be obtained by court action.

1224-d to f saves pending actions against the consolidators, saves old liabilities, and sketches, in general terms, the powers of the consolidation. Section II allows banking corporations to take advantage of the Act, with approval of the Corporation Commission, and extends the same privilege to Building and Loan, and Insurance Companies, providing the permission of the Insurance Commissioner is obtained.

The whole enactment furnishes definite machinery for merger and consolidation, which heretofore has been lacking in our statutes. While the language in the first section, permitting *any* corporations, engaging in *any* kind of business, to merge, will have to be interpreted in its relation to competing and non-competing companies, and its relation to statutes covering trusts, monopolies, and combinations in restraint of trade under the Sherman Law, etc., the court will, perhaps, have an easier task of interpretation under the present language of the Act than would have been the case if the Legislature had attempted to define and restrict specifically.

Ch. 118. Amendment of Corporate Charter and Creation of Classes of Stocks—The first section of this new enactment amends C. S. 1131, dealing with the procedure necessary to amend the charter of a private corporation. The seventh paragraph of C. S. 1131 provided that any proposed amendment to corporate charters should receive a favorable vote by *"two-thirds in interest* of each class of stockholders with voting powers" before it could be adopted by the corporations. By the amendment, the above quoted words are stricken out, and replaced by the words, "the holders of a *majority* of the shares of stock."

The section goes on to add to paragraph seven of C. S. 1131 a paragraph by virtue of which a corporation may insert in its charter at time of organization a provision that amendment to the charter can only be made if a certain number of shares vote favorably, a majority being, of course, required as a minimum. A proviso follows the new section to the effect that no new class of stock which is to take priority over outstanding preferred stock, either as to dividends or distribution of assets, can be created by any corporation unless voted upon favorably by two-thirds of the number of outstanding preferred shares entitled to vote.

The general effect of the amendment is that the corporate charter may be amended so as to change the nature of the business done, change the corporate name, extend corporate existence, increase or decrease capital stock, change the value of its shares as to par, or "make any other desired amendment" (with the limitation in the proviso clause) by mere majority vote of its shareholders. The exact advantages of such an amendment could well be questioned. It withdraws to a large extent, the sense of security which an investor in corporate stock has heretofore enjoyed in this State against a radical change in the nature of the business into which he has put his money. Heretofore, the conservative stockholder has been secure in the knowledge that no change of purpose or nature of the business could be made unless a two-thirds favorable vote, admittedly difficult to obtain, approved the change. The amendment seems to open the door to sudden and ill-advised changes. On the other hand, it can be said in favor of the new Act that it represents another[1] step in a general movement to cease "coddling" the stockholder, in order that a more extensive corporate and commercial development may be en-

[1] See, for instance, the amendment to the Non-Par Value Stock law, Chapter 262, Public Laws of 1925.

couraged in North Carolina. Further, the new insert to paragraph seven of C. S. 1131, permitting each newly organized corporation to make its own provision with regard to the vote required for amendment of charters protects the stockholder in *future* corporations by giving him his choice at the outset: either to invest with knowledge that a mere majority is required to amend the charter, or to refuse investment until a two-thirds clause is inserted in the charter.

It would seem that the rights of stockholders in existing corporations should have received similar protection, by a provision to the effect that, if two-thirds of the present stockholders favor such a move, charters of existing corporations might be amended so as to provide for amendment of charter when approved by a certain number of shares, with a majority vote as the minimum.

Section two of the Act amends C. S. 1156, relative to classes of stock. The original act provided that the "voting powers or restriction or qualification thereof" (of corporate stock) should be those which "are prescribed by those holding *two-thirds* of its outstanding capital stock, (entitled to vote[2])." And further that "no corporation shall create preferred stock except by authority given to the board of directors by a vote of at least *two-thirds* of the stock voted (entitled to vote) at a meeting of the (common) stockholders . . ." The amendment in the present Act strikes out the above italicized *"two-thirds"* in each instance, and substitutes the words, *"a majority."* The same proviso follows which was included in section one, i.e. that no new class which is to take priority over outstanding preferred stock, either as to dividends or distribution of assets, can be created by any corporation unless voted upon favorably by two-thirds of the number of outstanding preferred shares entitled to vote.[3] Section 2-a provides that the Act shall not apply to banks and building and loan associations.

The second section seems to follow as a natural corollary of the first, since it would be superficial to make the provision for amendment in Section One, if a two-thirds vote of the stockholders was required to change the qualifications and restrictions on the voting power of the stock.

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[2] Wording changed by Chapter 155, Public Laws of 1923.

[3] Compare the wording of these provisos with that contained in Section I of Chapter 262, Pub. Laws of 1925, with reference to the vote required in case of Non-Par Value Shares. (Same discussed in this issue of the *Law Review,* infra).

Ch. 235. Power of Sale by Corporations—Section 1126 of the Consolidated Statutes, covering "Express Powers" of corporations, gives eight general powers. This new Act creates a ninth subsection to 1126, relative to Power of Sale by corporations.

The new subsection provides that a corporation may sell any part or all of its property, when the sale is authorized by a two-thirds vote of the board of directors, and approved by vote of the holders of two-thirds of the stock entitled to vote, at a stockholder's meeting, notice of which shall contain notice of the proposed sale.

To the grant of the power, several provisos are attached: first, that corporations hereafter organized may, by charter provision, set the amount of stock which shall be necessary to approve the sale (not less than two-thirds, however); second, that corporations heretofore organized may, by vote of two-thirds of the stockholders entitled to vote to amend the charter, make such amendment so as to enable the corporation to take advantage of the new Power of Sale section.

As the Legislature, at the same session, 1925, had previously enacted Chapter 118, which provides for a majority, instead of a two-thirds, vote of the stockholders to approve a charter amendment, it would seem that the present chapter, 235, was intended as an exception to the general rule laid down in 118. The proper construction would seem to be that, in regard to general amendments, 118 applies, but, if the amendment is to give the corporation the right to take advantage of the Power of Sale, 235, requiring a two-thirds vote of the stockholders, applies.

Ch. 262. Amendment to Non-Par Value Stock Law—The first section of this new Act amends Section I of Chapter 116, Public Laws of 1921.[4] That original section provided that any corporation except four classes, viz: banks, trust companies, railroads and insurance companies, could, in its original charter, or by amendment thereof, create shares of stock without par value, each share, subject to internal restriction, to equal each and every other share. The amendment strikes out that section, and substitutes in its stead the provision that any corporation heretofore or hereafter organized under the laws of this State "whether under a special act of the Legislature or otherwise," except banks, trust companies, railroads and insurance companies, may, originally, or by amendment, create

[4] Brought forward in C. S. Vol. III, Chapt. 22, Art. 5-a.

shares of stock without par value, "and may create two or more classes of stock or debentures, *any class or classes of which* may be with or without nominal or par value." Such stock may be created "with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter, or amendment thereof, or by resolution adopted by those holding two-thirds of the outstanding capital stock entitled to vote."

An interesting comparison can be made between the above-quoted language with regard to the vote necessary to adopt such resolution, i.e. *two-thirds of the outstanding capital stock,* and the provisions contained in Section 2, Chapter 118, which the Legislature passed six days earlier in the session. That section, amending C. S. 1156, provided that creation of classes of stock should receive sanction of a "majority" of the stock entitled to vote, instead of a "two-thirds" vote as heretofore required, "*provided,* that no new class of stock shall hereafter be created entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with consent by the holders of record of two-thirds (or such greater number as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers."

After changing, then, the old rule requiring two-thirds vote of stockholders for creation of classes of stock, and substituting the requirement of a mere majority, by Chapter 118, Section 2, the Legislature, in Section 1 of Chapter 262, swings back to the old law when non-par value classes are created, ignoring the rather broad language of the earlier chapter. It may very well be that, through judicial interpretation, the language of these two chapters can be reconciled, and the legislative intent satisfactorily determined, but at the present writing the following points might well be raised:

1. Since Section 2, Chapter 118, requires only a majority vote of stockholders to create classes of stock, and the proviso to that same section retains the two-thirds rule whenever the new class to be created is to have priority either as to dividends or assets, it may be that the Legislature regarded classes of non-par value stock, treated in Chapter 262, as being, *per se,* stock which would be given priority over existing classes, if created at all, because of the very fact that it would have no par value. If this was the concept, the language used would still be unfortunate because, first, the proviso

to Chapter 118 only saves the two-thirds vote when the new class is to gain priority over outstanding *preferred* stock, and then only demands the consent of two-thirds of the shares of *such outstanding preferred stock,* while Chapter 262 provides, in general language, that the preferences of the new stock shall be designated either by the charter, or "by resolution of those holding two-thirds of *the outstanding capital* stock." Second, it would seem an unfortunate use of terms because, it will be noted, Chapter 262, in discussing creation of shares, does not confine its language to non-par value stock: "Any corporation . . . may create two or more classes of stock or debentures, any class or classes of which may be *with or without* nominal or par value." The section then goes on to say that designations, preferences, etc., etc., shall be made either by charter or by resolution of two-thirds of the outstanding capital stock. Therefore the conclusion seems to be that, by virtue of the language used, a case could still arise wherein a new class of stock *with* par value was created, in which case the resolution of two-thirds of all stock might still be required,—the previously enacted Chapter 118 to the contrary.

2. If, on the other hand, the Legislature did not conceive of non-par value stock as stock which, from its nature, *is* stock having certain priority, it could be argued that Chapter 262 is intended as a partial repeal of Chapter 118, making an exception to the provisions of that earlier chapter in so far as creation of non-par value stock is concerned. If this is true, it is submitted that a sentence or two to that effect in Chapter 262 would have clarified the meaning of the two sections.

Another feature of Section One of the new Act is worthy of note, i.e. that the language used referring to classes of stock created, "*any* class or classes of which may be with or without nominal or par value," apparently allows the creation of non-par value preferred shares. This move follows the lead of several other industrial states, and, it is believed, will prove an attractive feature of our incorporation laws.[5]

Section Two of the Act retains, approximately, the provisions of the present law in regard to the issuance of stock, in connection with the new non-par value issue. The outstanding features of the sec-

[5] See, for instance, the comment as to the effect of the recent Delaware provision in re Non-Par Value Preferred Stock, in "The Corporation Journal", Vol. VI, No. 137. p. 292: "Delaware, ever favorable as a state for incorporation, now becomes doubly so . . ." etc.

tion are that the non-par value shares may be issued "on such terms . . . as may be determined . . . by the board of directors"; that the consideration for the stock is to be "in the form of cash, property, tangible or intangible, services or expenses"; and that "all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable for further assessment thereon, nor shall the subscriber or holder be liable for any further payments."

The whole subject of issue of shares of stock at a discount, or for overvalued property, has been an embarrassing one in our law. The dollar sign on the stock certificate at time the certificate is exchanged, by the board of directors, for property or services, has raised the continual question of whether the stock has actually been paid for, and, if there is a marked discrepancy between the dollar sign denoting par value and the market value of the property exchanged for the stock, whether third parties and creditors can complain.[6] It has been suggested that perhaps the permission to issue non-par value shares will result in the simplest solution of this overvaluation problem. The following comment was made on the New York non-par value statute:[7] "It often happens that a corporation having an established business finds itself in need of capital, and desires to raise the required capital by selling additional shares at their market value. However, if the market value of the shares should be less than their nominal or par amount, the corporation would be precluded from raising money by selling shares, inasmuch as they could not be lawfully issued for less than their nominal or par amount . . . To meet such situation . . . a statute was passed in New York for the creation of corporations with shares having no nominal or par value. . . . The policy of the New York statute is sound. It recognizes that shares in a corporation represent only aliquot interests in its capital, whatever that may be, and that their nominal or par

[6] See C. S. 1157-8; *Hobgood* v. *Ehlen*, 141 N. C. 344, 53 S. E. 857 (1906); *Whitlock* v. *Alexander*, 160 N. C. 465, 76 S. E. 538 (1912). Compare *Scoville* v. *Thayer*, 105 U. S. 143, 26 Law Ed. 968 (1882); *Penfield* v. *Dawson, Etc. Gas Co.*, 57 Neb. 231, 77 N. W. 672 (1898); and *Herron Co.* v. *Shaw*, 165 Cal. 668, 133 Pac. 488 (1913).

[7] Act of April 15, 1912, being sections 19-23 of the New York Stock Corporation Law.

value is no indication of their actual value or of the actual capital of the corporation."[8]

While the Non-Par Value laws in North Carolina, both the original simple law of 1916 and the more elaborate amendment of the current year, may meet the problem of issue of stock at a discount and for overvalued property, the non-par value stock laws have not come into the field without adverse criticism. Those who do not favor this type of stock have labelled it as another dangerous tool in the hands of the crooked promoter. Its proponents claim for it the advantage of putting the purchaser of the stock on notice to investigate and determine for himself the value of the stock,—in which investigation his eyes are not blinded by the dollar sign on the certificate.[9] But, in the words of an accepted authority: "It remains to be seen whether this (non-par value stock law) does not create more frauds than it prevents. The *theory* of it is that stockholders and creditors should investigate for themselves the corporate assets and financial condition. The *fact,* however, is that the public do not and cannot know the real inside facts. . . . No par value stock is well adapted to the formation of bubble companies. New York originated no par value stock in 1912, but is gradually finding that it does not produce the expected results, and seems bewildered as to how to reconcile such stock with a substantial fixed "capital," without which a corporation readily becomes a fraud *per se.* . . . These no par value statutes are destroying the respectability of the corporate form of organization."[10]

Whether the non-par value stock laws in this State will have the desired beneficial affect and subscribe to North Carolina's growth as a commercial state, or whether they will react like a boomerang to breed mistrust and uncertainty in corporate investments, time alone will tell.

F. S. R.

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[8] Morawetz, "Shares without Nominal or Par Value". 26 Harvard L. R. 729-31. (1913).

[9] For full discussion of Non-Par Value Stock, see "Shares of Stock Without Par Value", 1 N. C. Law Rev. 26, by James H. Pou, of the Raleigh Bar. (1922).

[10] Cook, "Principles of Corporation Law", (the handbook) Chapter IV, p. 153-4. (1925).

CRIMINAL LAW

Ch. 14. The Bad Check Law—The giving of worthless checks has been regulated by the Acts of 1907, ch. 975 and 1909, ch. 647 (C. S. 4283) which provides that "Every person who with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor. The giving of the aforesaid worthless check, draft or order shall be *prima facie* evidence of an intent to cheat and defraud."

An inspection of the statute will show that several elements entered into the constitution of the offense. The evidence must show (1) that the person charged had an intent to cheat and defraud another, (2) that he obtained money, credit, goods, wares, or other things of value, (3) by means of a check, draft or order of any kind, (4) drawn upon any bank, firm or corporation, not indebted to drawer, (5) that such person had not provided for the payment or acceptance of the same or it had not been paid upon presentation and (6) that the giving of such check, draft or order shall be *prima facie* evidence of an intent to cheat and defraud. And although not expressly stated, yet a logical interpretation of this Act will show that the check must be given for value presently received. In the case of *State* v. *Freeman*,[1] defendant was charged with a violation of the Act. He moved for a nonsuit upon the ground that the evidence did not show that he obtained anything of value within the purport of the statute. The evidence showed that the check was given to pay the freight on a carload of lumber. The court held that this was a thing of value within the meaning of the statute.

In the first case[2] to go to the Supreme Court under the new Bad Check Law, Adams, J., outlines the elements constituting the offense under the new law as follows: "There must be evidence (1) that the person charged has drawn and delivered to another a check or draft signed or purporting to be signed by him, (2) drawn on a bank or depository for the payment of money or its equivalent, (3) that such person at the time of delivering the check or draft had insufficient (a) funds on deposit in or (b) credits with the bank or

[1] (1916) 172 N. C. 925, 90 S. E. 507.

[2] *State* v. *Edwards* (1925) 190 N. C. 322.

depository to pay the paper upon its presentation, and (4) that such person has failed to provide such funds or credits for the payment of the paper as provided by the statute—that is (c) upon presentation or (d) within ten days after written or verbal notice of nonpayment."

Speaking further in the opinion for the court, Justice Adams says: "It will readily be seen, therefore, that the indictment must charge both 'insufficient funds' and 'insufficient credits'; for though the funds on deposit may be insufficient, the 'credits'—'the arrangement or understanding with the bank or depository'—may be amply sufficient to protect the check or draft upon its presentation. The indictment is fatally defective in that, while charging 'insufficient funds on deposit' it makes no reference whatever to a want of credits; and the defect is not cured by the clause which affords the drawer an opportunity to provide funds or credits for payment upon presentation of the check or draft or within ten days after notice of nonpayment."

While the check had to be given for value presently received under C. S. 4283, there is no such requirement in the Act of 1925. The language is sufficiently comprehensive to include a check or draft drawn to cover a past indebtedness. By the former Act the check had to be given with intent to cheat and defraud; no such intent is required by the Act of 1925. By the former Act the defendant became guilty upon his failure to pay on presentation; the latter Act gives a period of ten days after notice during which the bad check may be made good.

The defective indictment being sufficient to dismiss in the above case, the court expressed no opinion as to the constitutionality of the Act of 1925. Article I, section 16 of the Constitution of North Carolina provides that "There shall be no imprisonment for debt in this state, except for fraud." What was sought to be prohibited under this provision was the imprisonment of one who had done nothing more reprehensible than to fail to pay a sum of money owing under a contract. The word "debt" as thus used extends only to an obligation arising *ex contractu*, and does not embrace a duty to pay money arising *ex delicto*.[3]

The Act of 1907 made the giving of a worthless check *prima facie* evidence of an intent to cheat and defraud. The Act of 1925 makes no provision in this regard. But a court might well hold that

[3] See *Imprisonment for debt in North Carolina*, 1 N. C. L. Rev. 229.

the giving of worthless checks is a fraud and therefore uphold the constitutionality of the statute under the section prohibiting imprisonment for debt. Where a party misrepresents a fact which is within the means of his knowledge and he fails to have such knowledge, he is nevertheless guilty of fraud. Although the reason for giving the check might be to pay a contractual debt, yet the giving of a worthless check is a separate and distinct thing and might well be deemed a fraud.

G. M. H.

Protection of Public Libraries—Ch. 118, Pub. Laws 1921, made it a misdemeanor to wilfully or maliciously detain any book, magazine, etc., for 15 days after notice from the library. Such offense was made punishable in the discretion of the court: with proviso that the notice required by the above law should bear upon its face a copy of the law.

Ch. 39 substitutes for the above that it shall be a misdemeanor to *fail to return* any book, etc., to a public library within 15 days after notice. Punishment for such offense is limited to a fine not exceeding $50 or imprisonment for not more than 30 days. The same proviso is made as to requiring a copy of the law upon the face of the notice. A saving clause is added.

Whether university, college and school libraries are public libraries within the act is not clear.

Anti-Flirting Law—Ch. 189 makes it a misdemeanor for any male person to wilfully disturb or annoy the students of any school or college for women by rude conduct or by persistent unnecessary presence on or near the property of the school or college; or by the wilful addressing or communicating orally or otherwise with said students while on school property or while elsewhere when in charge of a teacher, officer or student of the school.

Three aspects of the situation merit a slight comment. First, the law presumes that the modern girl needs protection against the attentions of the male. The school and college girl of today resents this sort of protection because her training and education tends to the development of individual responsibility. Second, it is doubtful if the law is needed. We have many laws regulating disorderly conduct, breaches of the peace, indecency, threatened assault, slander, etc. The present law just adds to the burden of enforcement and administration. Third, the law is futile. It belongs to a day when

women were carefully guarded from contacts with the world and were cloistered away from the presence of men. That was also the day when women had an inferior position before the law. Women now stand on an equality before the law and insist on a similar equality in their social and business life. Whenever the law is called upon to control personal conduct and private morality, it faces an impossible task, which tends to increase disrespect for law. The anti-flirting law seems doomed to join the mass of dead-letter laws.

Bureau of Identification—Ch. 228 establishes a Bureau of Identification for the purpose of gathering and disseminating criminal intelligence. The law designates as director of the bureau a deputy warden of the State Prison, who shall be a finger print expert. The principal office is to be at the State Prison. The director is given a wide range of duties to perform, including the classifying, comparing and compiling of police information to be disseminated to the various city and county police officials or any state officials requiring the information. Local officials are required to take finger prints of every person convicted of a felony and forward the same to the bureau. As to other persons arrested for crime, taking finger prints is a matter of discretion with the police officials. This seems to be a fairly large discretion to leave in the hands of the average police official, when a person has merely been arrested. The act further provides that any paper, form or record made as above, when *sealed* by the director, shall be admitted as evidence in any court of the State.

The need of such a law as this indicates the increasing difficulties and complexities of administering criminal law in our changing society. P. J. R.

EMINENT DOMAIN

Ch. 175 amends C. S. 1698 and subjects to condemnation under the power of eminent domain any mill, whether operated by water power or otherwise, together with all lands and easements adjacent thereto or used in connection therewith; also any waterpower, developed or undeveloped, with lands adjacent thereto necessary for its development.

This provision does not apply to cotton mills now in operation or to any water-power, right, or property, of any person, firm or corporation engaged in actual service of the general public where such water-power, right or property is being used or held to be used or

to be developed for use in connection with or in addition to any power actually to be used by such person, firm or corporation serving the general public.

By the enactment of this amendment, the provisions of the Revisal 1573, amended by North Carolina Public Laws of 1907, are repealed. The power of eminent domain, as applied to mills and water-powers was expressly denied in that statute.

Although mills and water powers could not be condemned generally for public use before the passage of the 1925 law, yet the courts of North Carolina recognized the fact that the Legislature could grant special charters to *quasi*-public corporations which would allow them to exercise the power of eminent domain over mills and water powers, despite the general statute (1907) to the contrary.[1]

J. Q. L.

INSURANCE

Group Life Insurance—Ch. 58 provides for group life insurance. This is comparatively new, but seems to be increasing in favor. Its attractiveness lies largely in the fact that no medical examination is necessary. This is because the mortality rate in any given homogeneous group is only the average mortality rate as shown by the mortality tables. If the ordinary life insurance were issued without physical examination, the sickly and feeble would apply in great numbers, thus raising the death rate, as based on experience. This would not be so in a selected group and this is what group insurance does. For instance the University of North Carolina might take out a group life insurance policy on all its employees, insuring them against death, total and partial disability and old age. The average in this group would be about the same as the general average and, therefore, no unusual losses would result to the Company, even though they had required no medical examination.[1]

This idea embodied in the New York Law in 1918[2] and Massachusetts in 1921,[3] now appears in the North Carolina Law.[4]

Section 1 is copied verbatim from the New York law requiring the group to include not less than fifty employees and that 75 per-

[1] *Power Co.* v. *Power Co.* (1916) 171 N. C. 248, 88 S. E. 349.

[1] See Proceedings of the Insurance Institute of Toronto 1913-14. p. 66, quoted p. 110, Wood, *Cases on Insurance* (2nd ed.)

[2] N. Y. Laws 1918, Ch. 192 (N. Y. Ins. Law, § 101a.)

[3] Mass. Gen. Laws 1921, Ins., § 133.

[4] N. C. Pub. Laws 1925, ch. 58.

cent of them shall be insured where they pay the premium jointly with the insurer.

Standard provisions of the policy to be filed with the Insurance Commissioner require:

(a) Incontestability after two years except for nonpayment of premium and conditions about military and naval service in time of war. (Note that fraud is not excepted).

(b) Policy and application shall constitute entire contract, and warranties are construed as representations, just as in ordinary life and fire insurance policies.

(c) Provision for equitable adjustment of premiums in case of misstatement of age.

(d) Individual certificate to employee and new individual policy if he changes employment.

(e) Provision for adding new employees who are eligible.

The proceeds are exempt from execution.

CH. 70—This act contains several amendments to C. S., ch. 106 (N. C. Ins. Law). Section 1 requires bona fide resident agents. The reference to C. S. 6302 seems to be wrong.

Other provisions affect fraternal insurance, tornado insurance, and coinsurance.

This last is very little used in North Carolina, the three-fourths value clause being more common, but it may be upon request stamped "Coinsurance contract." The insured can then recover for the full amount of his loss (not simply three-fourths value); but he must insure the full value of his property, or he becomes his own insurer for the difference. This kind of insurance will probably become more common in North Carolina as it has in New York, where it is better known.

CH. 82—Increases the amount to which life insurance may be issued without physical examination under C. S. 6460 from $300 to $2,000 and provides that misrepresentation does not avoid policy except in case of fraud.

CH. 298—INSURABLE INTEREST—In *Trinity College* v. *Ins. Co.*,[6] a policy by a member of the Methodist Church in favor of Trinity

[5] N. C. Pub. Laws 1925, ch. 70.

[6] (1893) 113 N. C. 244, 18 S. E. 202.

College (now Duke University), the institution paying the premiums, was held void because a wagering contract.

Ch. 298 undertakes to give to religious, charitable and educational institutions an insurable interest in the life of any student, former student, friend or any person loyal to the institution, when such person makes an institution the beneficiary in a life insurance policy and has paid the premiums on said policy. This act covers alumni giving plans, etc. It is to be noted that there never was any objection to a person taking out insurance on his own life payable to any beneficiary he selects. This involves no question of insurable interest, as was involved in the *Trinity College case,* where the institution took out the policy on the life of a church member. *Victor* v. *Mills*[7] held that it was beyond the power of a corporation to insure the life of any officer, but this was changed by statute in 1909,[8] because of the above case to the contrary. It would appear that the legislature intended to extend the doctrine of insurable interest to the case of an institution taking out a policy or paying premiums on a policy insuring the life of a student, friend or person loyal to the institution, but the statute does not so provide. It merely states a well-established rule in the law of insurance, whereby a person may take out a policy on his own life and provide for a beneficiary as he sees fit.

P. H. W.

POLICE REGULATIONS

Regulation of Trades and Callings—The tendency of present-day legislatures to regulate the carrying on of various professions and businesses was illustrated during the past session of the North Carolina General Assembly. That vast and indefinable power of the State, called the police power, reaches out to say how certain employments shall be carried on. The regulated employments form a constantly increasing list. Men and women are no longer let alone to work as they please. The standards of their professions and employments are raised whether they approve or not. The State is insisting that certain employments be regulated so that persons engaging in them may be more competent and may be mindful of the public interest involved in their work. For this purpose, boards and bureaus are multiplied, preliminary training is required, examinations must be passed and licenses are issued, with the usual license

[7] (1908) 148 N. C. 107, 61 S. E. 648.

[8] N. C. Pub. Laws 1909, ch. 507; See *Trust Co.* v. *Ins. Co.* (1917) 173 N. C. 558, 562, 92 S. E. 706.

fees. Doctors and dentists, banks, common carriers, public service corporations, makers and sellers of food products, etc., have all come under the State's power of regulation. The law regulating bus lines is another example. Further instances, taken from the 1925 statutory changes, follow:

1. Professional Nursing—Ch. 87 is a new law on the subject, taking the place of all previous laws. It provides for a board of nurse examiners, who shall prescribe regulations governing applicants for licenses and shall examine graduate nurses applying for license to practise their profession in North Carolina. Such applicants shall have a minimum of one year of high school education or its equivalent and shall have graduated from a school of nursing connected with a general hospital giving a three years course of instruction or with a private hospital which affiliates with other schools of nursing to give the requisite training.

A license must be obtained by all nurses, except where the nursing is gratuitous by friends or members of the family, or where a student nurse is sent out by an institution and does not represent herself as a trained nurse. Provision is made for registering such licenses in the office of the clerk of courts. Licenses may be revoked when any registered nurse is convicted of gross incompetence, dishonesty, intemperance or any act derogatory to the morals or standing of the profession of nursing.

It is made a misdemeanor to use the title of trained, graduate, licensed or registered nurse without first obtaining a license as above indicated.

2. Private Employment Agencies—Ch. 127 provides for the licensing of all persons operating or conducting a private employment agency. The license is issued by the Commissioner of Labor and Printing, who is empowered to make general rules and regulations in relation to the licensing of employment agencies. The act only applies to agencies which hold themselves out for public service Sixty days is fixed as the dividing line between temporary and permanent employment. For temporary employment, the fee shall not exceed ten percent of the first month's wages; for permanent employment fifteen percent. The Commissioner has power to inspect the books of employment agencies and to revoke their licenses after proper notice and hearing.

Any person who conducts an employment agency without a license shall be guilty of a misdemeanor.

3. Meat-Packing Industry—Ch. 181 provides that any person, firm or corporation engaged in the slaughter of meat producing animals in North Carolina shall apply to the Commissioner of Agriculture for a permit to transport and sell their products. The Commissioner shall make a thorough investigation of the sanitary conditions, the efficiency of inspection, etc., and, if the establishment is operated in accordance with the regulations which the Commissioner shall issue, a numbered permit shall be issued. This permit may be revoked by the Commissioner whenever any of the regulations prescribed for efficient inspection and sanitation are violated. The Commissioner has power to make all necessary regulations for the efficient inspection and preparation of meats and meat products and for the disposal of condemned meats.[1] Meat inspection must be conducted under the supervision of a graduate veterinarian. Municipal and county supervision is provided for in the inspection of meats in local establishments.

4. Ch. 190 regulates the business of selling stock and other securities. A separate discussion of this law, the Capital Issues Law, is found on the following page.

5. Private Schools—Ch. 226 is a step in making more effective the compulsory school attendance law by regulating the attendance of children of compulsory school age in private schools. The statute requires that private schools keep such records of attendance and render such reports as are required of public schools. If this is not done, attendance at a private school shall not be accepted in lieu of attendance upon a public school, and teachers and principals of private schools who violate this statute may be punished as for a misdemeanor. Authorized private schools must have courses of instruction which run concurrently with the term of the public school.

6. Public Accountants—Ch. 261 regulates the business of public accounting. Any citizen of the United States or person who has declared his intention of becoming a citizen, who is over 21 and of good moral character and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practise as a certified public accountant, shall be licensed to practise and be known as a certified public accountant. It is unlawful for any person to practise as or use words indicating that he is a certified

[1] See discussion of *Meat Inspection* in 3 N. C. L Rev. 27.

public accountant without having a proper certificate. Nor shall any person engage in the practise of public accounting unless properly licensed.

The State Board of Accountancy consists of four members appointed by the Governor. They have power to formulate rules for the government of the board and for the examination of applicants, to hold written and oral examinations, to issue certificates, to revoke certificates for good cause, etc. A high school education or its equivalent is provided as a prerequisite for applicants, which is more than required of applicants for admission to practise law.

7. General Contracting—Ch. 318 defines a general contractor to be one who for a fixed price undertakes to construct buildings, highways or other structures in accordance with plans and specifications prepared by a licensed architect or registered engineer, where the cost of the completed structure exceeds $10,000.

A State licensing board of contractors is created, the members to be appointed by the Governor. This board is authorized to organize and issue certificates to applicants to engage in the business of general contracting, after such applicant shall successfully pass an examination to determine his qualifications. The license may be revoked for cause and after notice and hearing by the board.

Any person practising general contracting after March 10, 1926, without being legally authorized by the State licensing board of contractors, shall be guilty of a misdemeanor. Existing contractors are entitled to a license upon payment of fees without submitting to an examination.

R. H. W.

Ch. 190. Capital Issues Law (Blue Sky Law)—A "Blue Sky" law is a popular name for acts providing for the regulation and supervision of investment companies, for the protection of the community from investing in fraudulent companies. The first of these acts was passed in Kansas in 1911.[1] Nearly all of the states have now passed them. A "Blue Sky" company is one that sells stocks, where commissions are paid agents on the sales, or deductions from stock sales are made for organization expenses. In short, it is a company or corporation that uses a part of the returns from stock sales for promotion expenses.[2]

[1] Bouvier's Law Dictionary, vol. I, p. 373.

[2] John A. Livingstone, in *News and Observer,* Nov. 23, 1924, Editorial section, p. 1; published at Raleigh, N. C.

Before April 1st, 1925, the "Blue Sky" statute in North Carolina was chapter 156, Public Laws 1913. This act provided that any foreign corporation selling or negotiating the sale of stocks, bonds or other evidences of property or interest in itself or in any other company, before being allowed to do business in this State, had to file with the Insurance Commissioner a statement of its assets and liabilities, its methods of doing business, and all other details of its incorporation which the commissioner might require under the statute and in order to satisfy himself that the company was "safe and solvent." Upon the commissioner being so satisfied, the company was granted a license to operate in North Carolina. "The Insurance Commissioner is given authority to exercise a high degree of control over them [these companies], it being unlawful for a licensed concern to print advertising matter without filing a copy with the commissioner, and the commissioner having authority to examine the accounts of the licensed company at any time at its expense. They are required to file statements quarterly of their stock sales and to file once a year a statement of their condition."[3]

The act required that every contract of subscription should be in writing and should contain a provision in the following language:

"No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of one per cent of the amount actually paid upon separate subscriptions (or in lieu thereof may be inserted, or one dollar per share from every fully paid subscription) for such securities, and the remainder of such securities shall be held or invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be), and the directors and officers of such company after organization as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

This law was at first applied only to foreign corporations, but by Chapter 121, Public Laws 1919, it was made to apply as well to domestic corporations. The law appears *in toto* in C. S. 6363-6375, and the provision just quoted, which in itself is known as the "Blue Sky" law, is section 6367.

The most recent cases arising under the "Blue Sky" law dealt with notes given in payment of stock. The two leading cases are

[3] See footnote (2) supra.

Planters Bank and Trust Company v. *Felton*[4] and *Seminole Phosphate Company* v. *Johnson*.[5]

In *Bank* v. *Felton*,[6] which was a case of the sale of some Fisheries Products Company stock in consideration of notes which were transferred to a bank, there being evidence for the jury as to whether the bank was a bona fide holder, Justice Clarkson said: "If these provisions (C. S. 6363-6375) are not complied with, is a note given for stock enforceable in this State? We think not as between the parties. The courts would not lend their aid to enforce the collection of a note between the parties given without complying with the statute and which makes the officer or the agent who violates this provision (C. S. 6367) of the act guilty of a crime. It would be contrary to public policy. The transaction is illegal—voidable, not void.

"If, however, the note was negotiated and purchased in due course without notice, bona fide, for value and before maturity, it would be enforceable in the hands of an innocent holder."

In *Phosphate Co.* v. *Johnson*,[7] Justice Connor said: "If upon a new trial, a verdict shall be rendered sustaining the allegations in the answer that the notes sued on were executed pursuant to a contract made without compliance with C. S. 6367, then the contract or sale as between the original parties was illegal and no recovery can be had on the notes." Here the payee of the notes was bringing suit by its receiver, it having gone into bankruptcy.

In another case, *Bank of Youngsville* v. *Hunt*,[8] Justice Clarkson said: "The note sued on being illegal and voidable, not void in not complying with C. S. 6367, and the jury having found that the plaintiff bank was the holder of the note in due course, without notice of the illegality, bona fide for value and before maturity, . . . this case is governed by the principle laid down in *Bank* v. *Felton*. The illegality is a defense between the original parties, but not in the hands of the purchaser in due course, without notice, . . ."

These three cases state the law with regard to "Blue Sky" companies before the Legislature began its record-making passing of

[4] (1924) 188 N. C. 384; 124 S. E. 849.
[5] (1924) 188 N. C. 419; 124 S. E. 859.
[6] See note 4, *supra*.
[7] See note 5, *supra*.
[8] (1924) 188 N. C. 377; 124 S. E. 854.

laws about a year ago.[9] On April 1st, 1925, Chapter 190, Public Laws 1925, became effective in North Carolina. The first section of this law reads: This act may be cited and shall be known as the "Capital Issues Law" of the State of North Carolina. The provisions of the act are, briefly, as follows:

The act does not apply to the following securities: securities of the United States or any political subdivision thereof; securities of foreign governments with which the United States is maintaining diplomatic relations; securities of Federal banks or corporations acting pursuant to Congressional authority; securities of public service utilities under Federal governmental supervision; securities fully listed upon any organized stock exchange having an established meeting place in a city of over five hundred thousand inhabitants; negotiable commercial paper maturing within fifteen months from date of issue; securities of North Carolina building and land banks whose capital stock is owned by domestic building and loan associations; securities of domestic organizations which have been in operation for five years, and which have shown for three years net earnings subject to certain detailed conditions; and securities of building and loan associations incorporated under the laws of North Carolina, domestic insurance companies, charitable organizations, and bonds and notes secured by marine insurance in responsible companies.

The act does not apply to the following transactions: legal sales; sale of securities pledged in good faith as security for bona fide liquidated debts; isolated sales not for promotion purposes; and bona fide transfers of stock by corporations out of surplus, or where no expense is incurred.

The act requires the submission of all advertising matter to the insurance commissioner before publication.

The act requires an application to be made to the commissioner for authority to sell. This application must show in detail all the affairs of the company, its assets and liabilities, its charter (in the case of foreign corporations), the plan of sale of securities, etc. "Every note given for stock sold under the provisions of this act must have appearing upon its face the following: 'The consideration

[9] "North Carolina leads the nation! This time it is in the business of making laws. Out of a total of 10,800 new laws passed in the 1925 legislatures of 38 states, North Carolina is credited with 1,173. which is slightly more than ten per cent." Quoted from Vol. 3, p. 3 of the Law Student (October 1, 1925).

of this note is stock in the..... corporation, and this note is not negotiable under the negotiable instruments law'."

"The contract of subscription or of sale shall be in writing and shall contain a provision in the following language: 'No sum shall be used for commissions, promotion and organization expenses on account of the sale of any securities offered for sale by this company in excess of five per centum of the amount actually paid upon separate subscriptions for such securities'."

The act requires the commissioner to investigate in his discretion any and all matters connected with the company applying for authority to sell securities, at the expense of the applicant. The commissioner shall maintain a permanent register of qualified securities, such register to be open to the inspection of the public. Every issuer of qualified securities shall file quarterly reports of its financial condition with the commissioner.

Section 22 of the act provides: "Every sale or contract for sale of any securities made in violation of the provisions of this act shall be voidable at the election of the purchaser thereof; and every person making such sale or contract for sale, and every agent of and for such seller who shall have participated or aided in any way in making such sale, knowing same to be in violation of this act, shall be jointly and severally liable to such purchaser, upon tender of said securities or said contract to the seller for the full amount paid by said purchaser, together with interest and all taxable court costs in any action brought under this section. No action shall be brought under this section after two years from the date of such sale or contract for sale."

Violation of this act is punishable by a fine of not less than two hundred nor more than five thousand dollars, or by imprisonment for not more than two years, or both.

The most important provision of this act is that requiring notice of consideration and a statement as to non-negotiability on the face of the note given in payment for stock. If the note is executed without the statutory notice, such illegality may be raised in an action between the original parties, and, as stated above, the sale or contract of sale would be voidable at the option of the purchaser.

If the statement as to non-negotiability does not appear on the face of a note given in payment of stock, the case would seem to be governed by the provision of the negotiable instruments law which says in substance that a statement of a transaction giving rise to an

instrument does not make it conditional so as to destroy negotiability,[10] and therefore a holder in due course would recover.

This act is designed obviously for the protection of the public from "wild cat" schemes and contributions to "fly-by-night" corporations and limber-mouthed salesmen. It makes the company soliciting subscriptions to its stock come up to very strict requirements, and it prevents the negotiability of any notes given in payment for stock unless the company has lived up to the strict requirements of the law.

H. Y.

(To Be Continued)

[10] C. S. 2984; *Bank* v. *Hatcher* (1909) 151 N. C. 359; 66 S. E. 308.

THE LAWYER AS A CITIZEN—HIS DUTY TO THE PUBLIC*

FRANK A. DANIELS

JUDGE OF THE SUPERIOR COURT, NORTH CAROLINA

When I received the invitation of the Wake County Bar Association, through its distinguished President, and read that he had assigned to me for discussion on this occasion, "The Lawyer as a Citizen—His Duty to the Public," I was embarrassed by the magnitude of the subject. I had something of the feeling entertained by one of our great Chief Justices, more than half a century ago, who, while at dinner with his family and his law students, was asked by a farmer neighbor who had been invited to dine with them, "Judge, what does Fearne say about contingent remainders?" and who replied: "Old friend, I regard that as a comprehensive question." Tradition has it that the great judge used an adjective then in common use to give emphasis to his reply which cannot now be found in the vocabulary of our present Chief Justice.

Manners change and morals, perhaps, with them, and we cannot in this age conceive the honored head of our judiciary giving point and pith to his conversation by the use of such a part of speech any more than we can envisage him making and selling, with the approbation of his fellow citizens, and the approval of his own conscience, the popular Alamance brandy which engaged the careful attention of another great Chief Justice of the olden time.

My embarrassment can be better understood when it is known that the letter of the President intimated that my discussion was to be confined to about half an hour; but, on mature reflection, realizing that the adequate treatment of this great topic would require a speech of four or five hours, with his usual considerateness, he added, "but there is nothing rigid about this requirement." However, in order to relieve any natural apprehension in the minds of my audience, I hasten to say that I do not regard this slight relaxation of the half hour rule as equivalent to its total abrogation. I am sure that this apprehension would entirely disappear if it was understood that I could speak with the brevity, clearness and conciseness,

* This is one of a series of addresses delivered before the Wake County Bar Association at Raleigh. N. C., on June 1, 1925. The other addresses will follow in a future issue of the LAW REVIEW.

with never a surplus word, yet adequately covering the case, which characterized the pleadings of the ablest lawyers of the generation which preceded mine, or that I possess the genius of John Somers, the young lawyer unknown to fame, who closed for the defendants, the Bishops of England, in the greatest libel case in the annals of English law, in an argument of ten minutes, and sat down with the reputation of the greatest constitutional lawyer of England. "O, wad some power the giftie gie us" that we might write and speak like those ancient worthies. What improvement we should see in our speeches, pleadings and briefs, and perhaps, in some of the opinions of our highest courts? But I despair of it in this busy, hurrying day, when we think superficially with the fast flying fingers of the stenographer and record too loosely and too elaborately our wisdom and our learning on her typewritten pages.

With these necessary preliminaries, I proceed to the discussion of the subject assigned, touching, under the severe restrictions imposed, only upon those phases of it that I regard as of outstanding importance.

And first, permit me to say that, if I could imagine myself old enough and wise enough to tender advice to my profession, I should urge, with all the impressiveness at my command, that every lawyer should be a politician. Do not, I beg you, be troubled by the use of a word well born and well bred that has sometimes wandered off, fallen into bad company, and in the estimation of some persons, acquired an unsavory reputation—but let us go back to its primary and noble signification. A politician may be defined as one who is versed in the science of government, and the art of governing, and who devotes himself to public affairs with the patriotic purpose to advance the safety, peace and prosperity of his country and its people. In a secondary sense, and like most secondary things, in a bad sense, he is one who concerns himself with public affairs, not from patriotism or public spirit but for his own profit, or that of his friends, or of a clique or party; a demagogue, a trickster, a petty and unscrupulous schemer. Let no lawyer or law student believe for a moment that I advise him to become a secondary politician; there have been too many of the tribe, and I do not pray for their increase. I am sure some of this latter class may have been in his view when the late Thomas Brackett Reed announced that a statesman is a politician who has died.

The lawyer who has studied government and the laws and constitutional principles upon which it is founded and who has engaged in the application of these laws and principles to the practical operations of government has gained an equipment which fits him, beyond most of his fellow citizens, for public service. He has acquired a knowledge of the fundamentals of government and their uses, and if, to paraphrase Edmund Burke, he has a disposition to preserve and an ability to improve, actively and continuously employed, he has enrolled himself among the highest type of politicians and statesmen. We have heard much of late of Fundamentalists and Modernists in the domain of religion. I have known few fundamentalists who did not have in them something insisted upon by modernists, and I have known no modernist who for the permanent basis of his faith did not hark back to essential truths for which the fundamentalists contend.

The thoughtful lawyer is primarily a fundamentalist in law and government, and his education has been largely concerned with the history of their origin and development. He has traced the beginnings of legislative assemblies and trial by jury as they have been evolved by the genius of our race. He has been present in spirit at Runnymede where the great barons of church and state, with the support of the commons, forced from a reluctant tyrant the "Great Charter," "with its guarantees of open courts, of trial by peers, its prohibition of arbitrary imprisonment, of the condemnation of person or property without due process of law, and of the sale, denial, and delay of justice;" he has been stirred by the Petition of Right, drawn by the Great Coke, the Habeas Corpus Act, the Bill of Rights, and the Act of Settlement, the splendid achievements of lawyers, statesmen, warriors and patriots, which together constitute, in the language of Lord Chatham, the British Constitution. He has studied the Mecklenburg Declaration, Jefferson's Declaration of Independence and his Statute of Religious Liberty. And he has found all these great achievements of the past, wrought out with infinite thought and labor and made forever sacred by the blood of our patriot ancestors, enshrined in our Declaration of Rights and in our Constitutions, State and Federal. Is it to be wondered at that such a lawyer, in contemplation of these principles, guaranteeing life, liberty and property, should be an unyielding fundamentalist? In his settled and matured judgment they are the productions of wisdom and experience, tested in peace and in war, and so consonant

with justice and the natural rights of man that they seem to him the last word in law and government in so far as they secure the Supreme Welfare of the citizen, and the sound and safe administration of his affairs—and he yields to them a reverence, a veneration that no writings other than the Oracles of God inspire. I have often thought it would be most wholesome if every lawyer and every layman would read once a year our Declaration of Rights, and the first ten amendments to the Federal Constitution.

A lawyer should everywhere and at all times stand for the preservation of the fundamentals of Constitutional Government. While this is true, he should remember that there are constitutional provisions of less dignity that have been and may be changed as new conditions arise; and the makers of our constitutions foresaw that this would be so, and wisely made provision for such change, but hedged this power about with such restrictions as would prevent hasty or ill considered action. Without these salutary restrictions the minority would have no protection against the tyranny and oppression of temporary majorities inflamed by victory at the polls and bent on immediate and destructive proceedings. Our Government is not and was never intended to be a pure democracy where people may change their institutions in a day, and by carrying a single election; but with us such changes must be well considered and deliberate. Some impatient people, zealous for improvement, criticize the slow steps by which our laws and especially our constitutions are changed; but thoughtful men realize that this slowness of change gives to our Government a strength and a stability sadly lacking in most of the governments of the old world, but does not prevent amendments that represent the settled and deliberate convictions of the people.

Lawyers should inculcate a respect for the traditions of government and should discourage change for the mere purpose of change, or to follow the example of some differently constituted government. Every proper alteration in constitution or laws can be effected by regular and legal processes, no change should be effected in any other way, and in America there is no necessity or excuse for mob law or revolutionary violence.

On account of the advantages they have enjoyed the precept and example of the legal profession greatly influence public sentiment. Although at times our people are humorously critical of their lawyers, and sometimes there are aspirants for office who think to curry

favor with the ignorant or unwary by denouncing lawyers, the average North Carolinian has an abiding confidence in the profession. In proof of their regard, I may cite the fact that of the fourteen governors elected in North Carolina since 1868 thirteen have been lawyers, that all our members of the present Congress, except one, are lawyers, and that at every session of the General Assembly both houses are full of lawyers. This generous confidence of the public places upon us a great responsibility.

As legislator the lawyer is under especial obligation to see to it that no legislation is enacted that violates either the State or Federal Constitution. Under his oath to support these great instruments his obligation as legislator is as binding as is the obligation resting upon our courts to protect us against unconstitutional legislation. No zeal of ignorant and impatient reformers, no insistence of special and selfish interests, and no importunity of hired lobbyists should turn him aside from his sworn duty.

He has no right to cast upon the courts the duty he has assumed. Much of the criticism which has been visited upon our Supreme Courts has resulted from the unfaithfulness, ignorance, or indifference of lawyers who have approved, or have not opposed legislation in conflict with constitutional principles. The lawyer should take for his chief and permanent guide the dictum of Jefferson, as applicable now as when it was uttered: "Equal and exact justice to all men and special privileges to none." He, more than any other legislator, should exert himself to perfect the machinery of justice. Sometimes he has failed in this respect from the influence of an unreasonable conservatism that blinds him to existing defects and their obvious remedies. I have known lawyers of the highest character, ability and learning who seem to fear that the dotting of an "i," or the crossing of a "t" in our law relating to procedure would bring down in irremediable ruin the whole structure. And I have known others so enamored of change that every new and untried experiment was regarded as the gateway to a modern Utopia.

The lawyer legislator should be not wholly a fundamentalist nor wholly a modernist, but, while holding fast to established principles, he should view with open mind the progressive and humanitarian movements of his age and espouse such as he deems consistent with such principles. This generation has seen more humane and progressive legislation than all the generations that preceded it, and the lawyer has taken his full share in advocating and enacting it.

The lawyer should lead in upholding the proper exercise of the powers conferred upon our several departments of government, refrain from captious criticism, be instant in condemnation of the abuse of such powers and lend his active support to their maintenance in all their vigor and usefulness.

He should avoid the error into which some high officers of state, some great captains of industry and some newspapers have fallen, who regard the assembling of the representatives of a great people in legislative session as a direful menace to the progress and prosperity of the country. We should do well to meditate in all seriousness upon the language of John Milton in his splendid eulogy on "A Free Commonwealth."

"For the ground and basis of every just and free government (since men have smarted so oft for committing all to one person) is a general council of the ablest men chosen by the people, to consult of public affairs from time to time for the common good," and to be intent on preventing all just complaints by the election to offices of trust and honor of only men of high character and capacity who measure up to the standards set by our laws and our institutions.

Inflated by its possession some officials forget the source of their power, and there are those among us who have yet to learn that ours is "a government of the people, by the people, and for the people," and not a government by or for any class however wise and great they may deem themselves.

The lawyer should always and everywhere support the administration of justice through and by the courts. The only tribunal yet discovered which usually and generally administers justice with success is a regularly constituted court of law, with its jurisdiction and procedure established by statute or immemorial usage and with public sessions open to all the world. These courts are human agencies and they make mistakes, but they are the best that the ingenuity of man has yet devised. Outside of the humanizing influences of religion and education, they are the only institutions that protect society from the destructive attacks of lawlessness and anarchy which are ever beating against the bulwarks of peace and order. There should be no secret trials. Every trial should be open and held under such circumstances and conditions as to invite publicity, scrutiny, and if necessary, criticism. The late Judge Bennett often said: "Justice cannot be administered in the dark." The lawyer is recreant to his duty, to his profession, and to his country, when he so far forgets

himself as to advocate the substitution of any secret tribunal or hearing of any kind, except as provided by law. Ours is a government of law not a government strictly of people. Higher than the wishes of the people is their obligation to law; and the people must not override their own law. We must remember that these laws have not been imposed on us by any outside power, but have been enacted by the people on their own initiative and in the exercise of their sovereign will. No power claiming to be independent of and superior to the Courts must be permitted to pass upon the lives, liberty or property of our people. The lawyer knows more perfectly than any other citizen that the safety and perpetuity of our government and our society lies in the reasonable, consistent, and continuous enforcement of our laws by courts whose procedure is regulated by law, and in the willing and cheerful obedience of all classes. No individual or organization can usurp these essential duties without serious and lasting injury to themselves and to the state. We have witnessed in the last few months a violation of this principle in one of our eastern counties where a mob took from the jail a prisoner charged with a capital felony, carried him to the woods, tried and convicted him, without evidence and without a hearing, and inflicted a punishment that their madness dictated. Later it was demonstrated that their victim was wholly innocent of the crime charged against him; and, after a fair and impartial trial in the county in which this inexcusable and outrageous violation of the law occurred, twenty or more members of the mob were convicted and duly punished.

Again it becomes the duty of the lawyer to guard against restrictions upon the power of the courts. It has been suggested in recent years that the power of the courts to declare a statute unconstitutional should be abolished, and that the General Assembly or Congress should be the sole judges of the laws which should be passed. Others have contended that there should be a compromise; and if the legislature or Congress twice passes the same law it should become a law, even though the courts should hold it to be unconstitutional. If either of these propositions be adopted, the division of power between the Executive, the Judicial and the Legislative departments of the government will be disturbed; and eventually the legislative power will become supreme and the other two subordinates. The judiciary is not supreme, as some would argue; it has only temporarily the power to declare a law unconstitutional, because if the people deliberately desire a change, they have it in their power at all

times to amend the Constitution. This has happened frequently. In 1895 the Supreme Court of the United States declared the first income tax law unconstitutional; but thereafter, the people decided to have an income tax law, and they changed the Constitution. We now have the income tax law, and we acquired it under regular constitutional methods, and the courts are enforcing the law and upholding the power of the government. The moment the power of the court is lessened that moment the power of some other department of the government is increased, and the balance of power can only be maintained by holding all three departments of the government strictly amenable to law.

After the Civil War, while the other sections were inflamed with indignation, and sought to impose upon us the stigma of defeat, Congress, controlled entirely by the other section, enacted laws directed against us. Among others Congress imposed a tax of 5c upon each pound of cotton grown, knowing that none was raised except in our section. It enacted the Civil Rights law; and it passed enforcement acts directed against the Ku Klux of 1868. The Federal Government undertook to enforce these laws, and the machinery of the government was directed against the South. But an appeal was taken to the Supreme Court of the United States. That tribunal then did not contain a single Southerner. A majority of that court did not agree with us politically, but when our section went before it asking justice, it was not denied; and that great court handed down opinions declaring all these statutes unconstitutional and void.

In this connection may I say that one of the speeches that stands out in my recollection among the greatest I have heard was that delivered, more than thirty years ago, by that eminent soldier, lawyer, statesman and orator, the late Senator M. W. Ransom, at Smithfield, then the home of your honored President, before an audience composed of citizens of the town, and a great gathering of the farmers of Johnston and the surrounding counties. As he stood before his expectant listeners and they marked his majestic form and manly grace, his intellectual and distinguished features, the courtesy and urbanity of his manners, and heard the tones of his marvelous voice, in an address in which his wisdom and patriotic devotion to country excited the admiration and affection of the highest and humblest of his hearers, I thought he surpassed the noblest of Roman Senators in the best days of the Roman Republic. He began his great speech with the statement that he had been grieved to read in some of our

State papers harsh criticism of the Supreme Court of the United States, but excused in somewhat gentle terms the critics because he believed their strictures came from ignorance, or that they were inadvertent to the history of that great court. He briefly sketched its career from the far off days when North Carolina was honored by the presence there of Iredell and Moore, paused to pay splendid tribute to the genius of Marshall, and pronouncing a glowing eulogy upon the character, learning and exalted sense of justice which had characterized its decisions. He referred in language of the deepest regret to the vindictive spirit of the men in control of every department of the National Government after the Civil War, and their desire to humiliate the people of the South in the hour of their bitter suffering. He traced in masterly fashion the origin and enactment of the legislation to which I have referred, the cruel and indefensible motives that actuated it, the consternation with which it filled the minds of a defeated but unconquerable people, its progress through the lower courts and its final destruction by the greatest judicial tribunal in the world, composed of great jurists whose love of justice and devotion to constitutional principles arose high above their loyalty to a party or a section. In conclusion he expressed the hope that he might never again hear from Southern men, and especially from North Carolinians, an unjust aspersion upon this palladium of our liberties.

In executive or judicial position, as prosecuting officer and in private station, the lawyer should never forget that he is a sworn officer of the law and bound by the highest obligation to teach reverence for the law and prompt and implicit obedience to its commands. And first, he is a teacher of reverence for the law. But what reverence can he have who wilfully violates the thing he professes to reverence? I could wish nothing better for my brethren than that they should resemble Chaucer's pastor in the Canterbury Tales of whom it is said:

> "Christes lore and his apostles twelve,
> He taughte, but first he followed it himselve."

We may be very sure that our teachings will have little effect if we ourselves are "disobedient unto the heavenly vision." It is our particular and especial duty to obey all of the laws of the land including those we do not approve. To obey those we approve is easy; to obey those we do not approve is a test of character. If a law does

not have our approval we have the right to agitate for its repeal, but while it remains in force the lawyer above all men owes the duty to himself and his fellow citizens to obey it. Suppose for the sake of illustration, improbable as it may appear, that legislators who make the law, judicial officers who interpret and administer it, and executive officers who enforce it, should become customers of the moonshiner and the blind tiger and moral accomplices in the violation of a law intended to protect society against crime, pauperism and insanity, with what assurance could they advovcate respect for and obedience to any law? Their failure would greatly impair and might sometimes destroy their power to influence others to obey what they regard as "the weightier matters of the law"; and the average man listening to their preachments would laugh them to scorn.

A judicious friend suggested that in this address I should emphasize the truth that the lawyer should be a good man, and another reminded me that Sir Walter Scott on his death bed placed his feeble hand on the hand of his son-in-law, and said: "Dear Lockhart, be a good man." Human experience through the centuries has shown that without goodness no man can be permanently happy or useful. Few persons have such opportunities for either good or evil as the lawyer. There are doubtless tricksters and shysters who should be driven out; but they by no means constitute the majority, nor even an important part of the profession, nor do they in any respect represent its spirit or character. The lawyer is trusted with the secrets of families, with the most important affairs of his clients and often with their money, and it is seldom that he betrays his trust. Lawyers are sometimes represented as men who encourage litigation; but my observation is that honorable lawyers discourage a great deal more litigation than they ever commence. The lawyer can be one of the most useful men in his community. He can stimulate and encourage business by removing doubts, preventing clouds upon title, and in countless ways assist those who carry on the more active affairs of life. While his clients give general direction to business, the lawyer advises how to avoid dangers of which they are not aware. He should always be scrupulously careful to counsel them to be law abiding business men and citizens. Some lawyers have fallen under the influence of corrupt and corrupting business represented by such types as the prominent capitalist and former member of the Cabinet who is reported to have said that he did not care for lawyers who could merely tell him what the law was, but the lawyer he wanted

was one who could tell him how to get around the law. Such lawyers have forgotten that they are teachers of obedience to law and a part of the administration of justice, and have become members of a trade of money getters who bring reproach upon an honorable profession. A lawyer has it in his power, if he sees fit to do so, to become a fomenter of strife. He can sow the seeds of discord and litigation. He may lay the foundation for permanent breaches in families and communities. And, unfortunately, for a time he may appear to make money from this sort of patronage. But my observation is that lawyers of this character do not last long. The money they make by this kind of practice is earned at a fearful cost. They pay for it with their own honor and reputation, and they must atone for it by carrying to the grave the execrations of the community in which they live. Other people may for a long time conceal from the public their true character but the lawyer cannot. No lawyer can practice for any length of time in a community without disclosing to that community his innermost heart and character. The public reads him as they would read a book, and they know him as he is.

And the lawyer should bear in mind that he is a member of the brotherhood of citizens, and, that while they acquiesce in his leadership, he must as their comrade participate in all their aspirations and give unstintedly of his time, labor and counsel to advance the general welfare. He must not isolate himself nor give his neighbors cause to believe that he thinks more highly of himself than he ought to think, nor that he is wiser than they. Indeed, he will find many laymen, engaged in the various pursuits of life, whose character, intelligence, and practical good sense are superior to his own, and, if he is wise, he will gladly seek to coöperate with them. At all times he should join hands with his fellow citizens to foster the enlightenment and the education of all the people, and the promotion of their material, social and spiritual interests.

"But above all," in the language of the closing sentence of the Code of Ethics promulgated by the American Bar Association, "a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

The
North Carolina Law Review

Volume Three | December, 1925 | Number Four

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Published in February, April, June and December, for The School of Law, by the University of North Carolina, Chapel Hill
The University of North Carolina Press

NOTES AND COMMENTS

WILLIAM ALEXANDER HOKE—In the June issue of the LAW REVIEW, there appeared an article by Chief Justice Stacy, entitled *Chief Justice Hoke, Patriot and Great-hearted Fighter for the Right.* On July 1, 1925, Judge Hoke wrote the following letter to the Editor:

"I am in receipt of several copies of the June number of the NORTH CAROLINA LAW REVIEW containing, among other things, Judge Stacy's article about myself and write to thank you for this attention. My Brother Stacy in his kindness overstates my case, but I'm very glad for him to feel and write about me in the way he has and glad too for you to read and publish it. I hope to visit Chapel Hill sometime during the Summer School and am looking forward to it with much pleasure."

The letter reflects something of the directness, the frankness, the modesty, the lovable disposition and the great spirit which was Judge Hoke. We are happy that Judge Stacy's expression of love and

esteem for Judge Hoke reached the latter before his death. It isn't often that the praise which is well merited by a great man comes to him while he is still alive and able to appreciate it.

The State and the profession of the law suffered a great loss in the passing of such an outstanding judge and Christian gentleman.

THE JUDICIAL CONFERENCE—The first meeting of the Judicial Conference was held in Raleigh on June 25, 1925. The opening address was made by Chief Justice Stacy and various proposals and recommendations were suggested. The LAW REVIEW will have an account of this meeting in the next issue, and some of the more important recommendations will be then considered.

JOHN JOHNSON PARKER—The recent appointment by President Coolidge of John Johnson Parker as Judge of the Circuit Court of Appeals for the Fourth United States Judicial District recalls again the fact that this is a day when young men are to be found in positions of high responsibility. Born in 1885 in the town of Monroe, N. C.; graduated from the University in 1903 after four years of active college life during which he was twice president of his class, president of Phi Beta Kappa, also of the Dialectic Society, editor of the *Tar Heel,* debator and winner of oratorical contests; returning to the University as instructor in Greek the next year and also receiving his law degree; then engaging in a most active practice of law for fifteen years, Judge Parker arose to the top of his chosen profession. He was always actively connected with public life, and the LAW REVIEW is happy to see this great honor come to a man of such a high grade of intelligence, capacity and character as John Johnson Parker.

Table of Contents

AUTHORS

PAGE

Cowper, G. Vernon. *Greetings from the North Carolina Bar Association* 54
Daniels, Frank A. *The Lawyer as a Citizen—His Duty to the Public* 156
Daniels, Josephus. *Acceptance for the University* 60
Ferson, Merton L. *Response from the Law School* 56
Hoke, William A. *Greetings from the Supreme Court* 53
Long, J. Elmer. *Presentation of the Building* 59
McIntosh, Atwell Campbell and Robert Hasley Wettach. *Statutory Changes in North Carolina Law in 1924* 14
Stacy, Walter Parker. *Chief Justice Hoke, Patriot and Great-hearted Fighter for the Right* 83
Trotter, John Paul. *Extraterritorial Operation and Effect of Confiscatory Decrees of the Soviet Government* 88
Vance, William Reynolds. *New Values in Legal Education* 41
Winston, Robert Watson. *Chief Justice Shepherd and His Times* 1

ARTICLES

Acceptance for the University. *Josephus Daniels* 60
Chief Justice Hoke, Patriot and Great-hearted Fighter for the Right. *Walter Parker Stacy* 83
Chief Justice Shepherd and His Times. *Robert Watson Winston* 1
The Dedication of Manning Hall 39
Extraterritorial Operation and Effect of Confiscatory Decrees of the Soviet Government. *John Paul Trotter* 88
Greetings from the North Carolina Bar Association. *G. Vernon Cowper* 54
Greetings from the Supreme Court. *William A. Hoke* 53
The Lawyer as a Citizen—His Duty to the Public. *Frank A. Daniels* 156
New Values in Legal Education. *William Reynolds Vance* 41
Presentation of the Building. *J. Elmer Long* 59
Response from the Law School. *Merton L. Ferson* 56
Statutory Changes in North Carolina Law in 1924. *Atwell Campbell McIntosh and Robert Hasley Wettach* 14
- Administrations 14
- Child Labor 15
- Constitutional Amendments 17
- Conveyances, Probate and Registration 19
- Coroners 20
- Corporations 21
- Counties and Municipal Corporations 22
- Courts and Civil Procedure 23
- Criminal Law 24
- Elections 26
- Mortgages and Liens 26
- Police Regulations 27
- Receivers 29

Statutory Changes in North Carolina Law in 1925 129
- Civil Procedure 129
- Corporations 132
- Criminal Law 141
- Eminent Domain 144
- Insurance 145
- Police Regulations 147

NOTES AND COMMENTS

An Agency Theory of Mechanics Liens. *G. H. J.* 62
Attachment of Stock in Foreign Corporation. *B. S. G.* 103
Inheritance Tax on Stock Owned by Non-resident in Foreign Corporation. *C. C. P.* 107
John Johnson Parker 168
The Law Review 30
Liability of Infant for Inducing Contract by Misrepresentation as to Age 110
1. Disaffirmance and Return of Consideration. *W. H. A.* 110
2. Estoppel as Basis of Infants' Liability on Contract. *H. A. B.* 116
3. Liability of Infant in Action of Deceit. *D. H. D.* 120
Loss of Consortium in North Carolina. *C. G. B.* 98
Manning v. Atlantic and Yadkin Railway Company. *W. T. H.* 69
Meeting of North Carolina Bar Association 97
Mortagee's Interest in Insurance Policy Under Standard Mortgage Clause. *C. B. M.* 74
Reasonable Use of Percolating Waters. *F. S. R.* 31
Recent Types of Administrative Action in North Carolina. *C. W. P.* 77
William Alexander Hoke 167

TABLE OF CASES

Assurance Co., Bank *v.* 74
Atlantic and Yadkin Railway Co., Manning *v.* 69
Bank *v.* Assurance Company 74
Cameron *v.* State Highway Commission 78
City of Kinston, Rouse *v.* 33
Davis, Rose *v.* 62
Doughton, Trust Co. *v.* 107
Everett, Taylor *v.* 80
Express Co., Parks *v.* 103
Greensboro Morris Plan Co. et al *v.* Palmer 110
Highway Commission, Road Commissioners *v.* 78
Hinnant *v.* Power Co. 98
Manning *v.* Atlantic and Yadkin Railway Co. 69
National City Bank, Sokoloff *v.* 88
Palmer, Greensboro Morris Plan Co. et al *v.* 110
Parks *v.* Express Co. 103
Power Co., Hinnant *v.* 98
Road Commissioners *v.* Highway Commission 78
Rose *v.* Davis 62
Rouse *v.* City of Kinston 33
Sokoloff *v.* National City Bank 88
State Highway Commission, Cameron *v.* 78
Taylor *v.* Everett 80
Trust Co. *v.* Doughton 107

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